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No. _____

In the Supreme Court of the United States

LAWRENCE E. WARNER AND GEORGE H. RYAN,
PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
VOLUME I of II

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QUESTIONS PRESENTED

1. Whether a trial court violates the Fifth and Sixth Amendments when it allows the removal and substitution of a deliberating criminal juror (here, after eight days of deliberations) where there is an objective possibility that the juror's removal was prompted by the juror's view on the merits.

2. Whether a trial court commits structural error in permitting a jury verdict where more than half the jurors are interrogated in the middle of deliberations about their own misconduct in the presence of a prosecutor.

3. Whether the Fifth and Sixth Amendment rights to a fair trial before an impartial jury are violated when a reviewing court refuses to conduct a cumulative error analysis despite "a flood" or "cascade of errors" that turns "a trial into a travesty," and where the defendant has complained on appeal not only of individual errors, but also of an "avalanche of errors" that together violated his constitutional rights.

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INTRODUCTION

This case, which arises from one of the highest-profile public corruption prosecutions in recent memory, presents three important questions of recurring concern to courts, prosecutors and defendants throughout the Nation. The first concerns the appropriate standard for determining when a deliberating juror in a criminal trial can be removed and replaced with an alternate: May a trial court remove and replace such a juror even where there is an objective possibility that the removal was prompted by the juror's views on the merits? The second issue arises somewhat less frequently but is equally important: Does a trial court commit structural error in permitting a jury verdict where more than half the jurors are interrogated in the middle of deliberations about their own misconduct in the presence of a prosecutor? And the third issue, like the first, is one that can and does arise in a wide variety of criminal proceedings: whether a reviewing court must assess trial errors not only for their individual effects, but also for their cumulative effect on the trial proceedings. All of these issues are the subject of widespread confusion and disagreement among the lower courts, and all are worthy of this Court's review.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit are reported at 498 F.3d 666 (Wood, J., joined by Manion, J.) (Kanne, J. dissenting) (reprinted at App. 1a-91a) and 506 F.3d 517 (Posner, J., joined by Kanne and Williams, J.J., dissenting from the denial of rehearing en banc) (reprinted at App. 92a-107a). The opinions of the United States District Court for the Northern District

of Illinois (Pallmeyer, J.) can be found at 2006 WL 2583722 (reprinted at App. 108a-243a) and 2004 WL 1794476 (reprinted at App. 244a-316a).

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2007. Petitioners filed a timely petition for rehearing and rehearing en banc on August 28, 2007. These petitions were denied on October 25, 2007. App. 93a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

Federal Rule of Criminal Procedure 24 provides in relevant part:

> The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

STATEMENT

This case arises from the criminal prosecution of George H. Ryan, Sr., the former Governor of Illinois, and his longtime friend, Lawrence E. Warner. They were charged with "honest services" mail fraud and other federal crimes.

1. Following six months of trial testimony, the jury retired to deliberate. Eight days into deliberations, the *Chicago Tribune* revealed that certain jurors had given untruthful or inaccurate answers related to prior criminal arrests or convictions on the juror questionnaire used six months earlier in voir dire. This news broke after the district court and counsel had spent days struggling to respond to a series of notes from the jury, including questions about substantive legal instructions, requests for transcripts and, most significantly, a serious conflict that developed between a group of jurors and Juror Evelyn Ezell — a juror later revealed to be inclined to acquit. Juror Ezell had complained about verbal abuse and intimidation in the deliberations. The group of jurors responded by asking the district court to remove Juror Ezell for failing to deliberate in good faith, and requested that the court empanel an alternate.

The district court suspended deliberations in response to the information disclosed by the *Tribune* and conducted its own inquiry. The investigation initially focused on two jurors, including Juror Ezell, but soon expanded once it was learned that over half the deliberating jurors had failed to disclose arrests, convictions or other significant contact with the court system. For three days, eight jurors were questioned by the district court in the presence of federal prose-

cutors and defense counsel about their undisclosed arrests, convictions and other misstatements or omissions in voir dire. The district court and counsel discussed the necessity of advising jurors of their rights, and, upon consultation with the United States Attorney, Patrick Fitzgerald, the prosecution informed the district court that it was willing to offer immunity to jurors on a going-forward basis. App. 77a-78a.

Ultimately, the district court removed two jurors — Pavlick and Ezell — for being untruthful. The district court substituted two alternates over defense objection, reasoning that while its decision might be error, the court wanted to reach a verdict after such an "enormously burdensome and expensive" trial. 3/24/06 Tr. at 24343-46. Then, eighteen days after the conclusion of closing arguments, the court told the remaining jurors to start "all over" and to "pretend you have never had a discussion about the case at all." App. 19a; 3/28/06 Tr. at 24650, 24805. The reconstituted jury returned guilty verdicts on all counts against both Petitioners after ten days of deliberations free from conflict.

2. Following post-verdict revelations that a juror brought extrinsic legal research into the jury's deliberations, the district court held a hearing. Interviewed by phone, Juror Ezell testified that during the second week of deliberations Juror Peterson brought a piece of paper into the jury room and read from it that "a juror could be dismissed for not deliberating in good faith." App. 211a; 5/5/06 Tr. at 11-12. Juror Ezell initially believed Juror Peterson to be reading a legal instruction from the court and started searching for it in her copy of the instructions, but Peterson stopped her and said, "No, it's not in there. You need to listen." 5/5/06 Tr. at 11. According to Juror Ezell,

after Juror Peterson finished reading from the paper, Juror Losacco said, "No, read the one to her on bribery, because George Ryan was taking bribes and so are you." App. 207a; 5/5/06 Tr. at 12. According to Juror Ezell, Juror Peterson responded, "No, we don't need to" — "We've got her. We've got her right there. We've got her where we want her," and she laughed at Juror Ezell. 5/5/06 Tr. at 12. Another juror (Jesse Davis) defended Juror Ezell, and Davis told Ezell to watch her back — a warning that made her "even more afraid." App. 207a; 5/5/06 Tr. at 12. Juror Ezell testified that she was in tears, and when she tried to leave the jury room, another juror blocked the door. App. 207a; 5/5/06 Tr. at 13.

Represented by legal counsel, Juror Peterson was interviewed by the district court by telephone and confirmed the substance of Juror Ezell's account. Juror Peterson explained that after a discussion concerning Juror Ezell during the first week of deliberations, other jurors encouraged her to conduct extraneous research, telling her, "Teacher, do your homework." App. 85a; 5/5/06 Tr. at 80. Ignoring district court instructions forbidding legal research, Juror Peterson then did a Google search and found articles on dealing with difficult people. App. 10a, 217a; 5/5/06 Tr. at 68, 80. The next night, she found an American Judicature Society article on the removal and substitution of jurors. Juror Peterson is certain that she showed that article to other jurors and cut out the following paragraph:

> But other bases for substitution raise serious questions about the sanctity of the deliberative process, primarily allegations by some jurors that another juror is unwilling or unable to meaningfully

> deliberate, or is unwilling to follow the law. Such an allegation requires a hearing where the judge must decide the tricky question whether the juror is truly unfit to serve, or is merely expressing an alternative viewpoint that will likely result in a hung jury. Only if the judge concludes that the challenged juror is truly unfit to serve, will the judge be authorized to dismiss that juror and substitute an alternate juror.

App. 12a; 5/5/06 Tr. at 59-60, 76. Juror Peterson testified that the next day she read the paragraph to Juror Ezell and every other member of the jury. App. 10a; 5/5/06 Tr. at 77-78. In connection with her extrajudicial research, Juror Peterson also crafted her own instruction on good-faith deliberation and read that instruction to Juror Ezell and other jurors repeatedly during the deliberations. App. 10a, 208a-209a; 5/5/06 Tr. at 63, 79-81.

The district court made an express finding that Juror Ezell was intimidated by the use of the AJS article in deliberations. 5/5/06 Tr. at 31-32. The court concluded that Juror Peterson's external legal research was regrettable, but characterized it as "a really innocent mistake" before denying defense requests to interview other jurors. 5/5/06 Tr. at 94.

The district court concluded that "in spite of difficulties generated by this very lengthy, high-profile trial," the Petitioners received a fair trial before an impartial jury. App. 193a. Accordingly, the district court denied repeated defense motions for mistrial as well as the posttrial motion seeking a new trial, and sentenced Warner to 41 months' imprisonment and

Ryan to 78 months' imprisonment. App. 242a, 319a, 330a.

3. In their opening brief on appeal, the Petitioners argued that an "avalanche of errors" related to the jury, its deliberations and the questioning, removal and substitution of jurors midway through deliberations deprived the Petitioners of their constitutional rights to a fair trial before an impartial jury. App. 2a. The Seventh Circuit, however, issued a sharply divided opinion affirming the convictions.

The majority held that extensive juror misconduct and the district court's unprecedented decision to substitute two jurors after eight days of deliberations did not violate the Petitioners' constitutional rights to a fair trial and impartial jury because each error considered in isolation was harmless. App. 10a-33a, 36a-42a. As to removal and substitution, the majority concluded that the trial court's instructions to the reconstituted jury were sufficient to prevent the chilling of deliberations in the new jury. App. 32a. In the majority's view, the removal and substitution of two jurors did not constitute error because the district court complied with the literal requirements of Rule 24(c). App. 38a. The majority further held that the district court's interrogation of jurors during deliberations did not compromise the jury's impartiality and did not constitute a structural error because the defense had requested that at least some jurors be questioned about their misconduct. App. 66a. Finally, the majority expressly declined to consider the cumulative nature of the issues raised by the defense. App. 3a. The majority opined that "the fact that the trial may not have been picture-perfect is, in itself, nothing unusual." App. 2a.

Judge Kanne voiced strong disagreement in dissent. He concluded that "the dysfunctional jury deliberations" deprived the Petitioners of a fair trial. App. 69a. Judge Kanne summarized the remarkable developments in 18 bullet points, later quoted verbatim by Judge Posner in the dissent from the denial of rehearing en banc. App. 69a-72a, 93a-96a. A mere sampling of these points includes:

- jurors interrogated by the district court for days in the presence of federal prosecutors midway through deliberations about their own false statements in voir dire;
- an astonishing effort by jurors to force the removal of a juror with whom they disagreed, and a juror's extrinsic legal research into the basis for seeking such removal;
- the removal of two deliberating jurors in the middle of deliberations (including a defense juror) for bias;
- a raft of other juror misconduct that included among other things repeated violations of the court's instructions, *ex parte* communications, and exposure to media coverage about the trial; and
- the unprecedented substitution of two alternates and reconfiguration of the jury weeks after closing arguments.

App. 69a-72a, 93a-96a.

According to Judge Kanne, the district court's interrogation of jurors in the middle of deliberations about their own misconduct constituted a structural error because it created "irreconcilable conflicts of interest" in which the jurors themselves were poten-

tially subject to criminal prosecution. App. 72a. Further, Judge Kanne concluded that a "flood of errors" required reversal of these convictions:

> To describe the circumstances surrounding the jury . . . as "nothing unusual" is to simply turn a blind eye to the realities of what occurred – in order to save the efforts expended during a six month trial.

App. 72a. As Judge Kanne concluded, the "breadth and depth of both structural and nonstructural errors" presented are "astounding" and "egregious" such that "a mistrial was the only permissible result." App. 90a-91a.

The Seventh Circuit denied rehearing and rehearing en banc, but that decision was far from unanimous: of the nine judges who participated, three dissented in an opinion written by Judge Posner, which concluded that "a cascade of errors turn[ed] a trial into a travesty." App. 97a. Indeed, as Judge Posner observed, the government's offer to immunize deliberating jurors during interrogations related to their own false statements "suggests the proceedings were broken beyond repair." App. 99a.[1]

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[1] In a dissent from the panel majority's decision to deny continuing bail pending certiorari, Judge Kanne further noted:

> I dissent because I disagree with the in chambers opinion's characterizations of the dissent from the panel opinion and the dissent from the rehearing *en banc*; the in chambers opinion's emphasis and reliance on forfeiture; and that opinion's conclusion that the appellants have not demonstrated a reasonable probability of success on the merits. The trial was riddled with errors

REASONS FOR GRANTING THE PETITION

Public confidence in our jury system depends upon the willingness of courts to police and redress serious and pervasive errors that affect the essential fairness of a trial and jeopardize a jury's impartiality. Yet here, as we explain in more detail below, the lower courts simply refused to do that, and their refusal raises three issues warranting this Court's review.

First, the lower courts are in conflict over the standards governing the removal and substitution of deliberating jurors. The decision below effectively eliminates any constitutional limitation on a district court's ability to substitute a deliberating juror provided that the court complies with express requirements of the recently amended Rule 24(c). Review is imperative because there is genuine confusion on this recurring issue of enormous practical importance.

Second, the interrogation of deliberating jurors about their own misconduct presents the type of structural defect that defies harmless error analysis. Jurors in jeopardy themselves cannot fairly and freely determine the outcome of a case after having been questioned in the presence of federal prosecutors about their own false statements. This constitutional error is of such a magnitude that it defeats the essential feature of the jury trial — impartial jurors.

Finally, the last issue raised in this Petition goes to the heart of a reviewing court's obligation to en-

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> that ultimately rendered the proceedings manifestly unfair and unjust . . . .

United States v. *Warner*, 507 F.3d 508, 511-12 (7th Cir. 2007). Justice Stevens subsequently denied an application for continued bail.

sure that errors, individually and in combination, do not deprive a defendant of his constitutional rights to a fair trial, unanimous verdict and impartial jury. The decision below is in conflict with decisions in other Circuits in its refusal to review for cumulative error, and is inconsistent with the precedent of this Court.

I. This Court Should Clarify The Constitutional Limitation On A District Court's Power To Remove And Substitute Deliberating Jurors In Light Of Amended Rule 24 And Should Resolve Conflicts Over The Removal Standard

Here, for the first time in the history of American jurisprudence, a federal district court significantly changed the composition of a jury over defense objection eight days into deliberations at a time when the parties knew the jurors' likely views of the evidence. What made this possible was a 1999 amendment to Federal Rule of Criminal Procedure 24(c)(3), which now authorizes the substitution of deliberating jurors if the alternate does not discuss the case prior to replacing an original juror and the reconstituted jury is instructed to "begin deliberations anew." The Seventh Circuit concluded that so long as the bare requirements of the rule are satisfied, there is no limitation (constitutional or otherwise) on a district court's ability to substitute deliberating jurors. App. 35a-36a. As a legal standard, however, that effectively insulates all but express rule violations from appellate review — even in a situation where, as here, a defendant expressly argued that the substitution violated his constitutional rights to a fair trial, unanimous verdict and impartial jury. App. 33a-34a.

1. The constitutional danger inherent in substituting a deliberating juror is that it can defeat an "essential feature" of the jury trial by compromising "group deliberation." See *Williams* v. *Florida*, 399 U.S. 78, 100 (1970); *Claudio* v. *Snyder*, 68 F.3d 1573, 1575 (3d Cir. 1995); *Henderson* v. *Lane*, 613 F.2d 175, 177 (7th Cir. 1980). Further, "[u]nanimity is one of the indispensable features of the *federal* jury trial." *Johnson* v. *Louisiana*, 406 U.S. 356, 369-70 (1972) (Powell, J., concurring) (emphasis in original).

Earlier authorities recognize the inherent difficulty in asking jurors to start deliberations anew, and the significant risk of coercion to the new alternates who enter deliberations after other jurors have already formed strong conclusions about the evidence. See, *e.g.*, *United States* v. *Quiroz-Cortez*, 960 F.2d 418, 420 (5th Cir. 1992). Further, there is a risk in high-profile cases that the alternate jurors, exposed to media and other outside influences, may inject extraneous information into deliberations. All these risks increase the longer the first jury deliberates. See *United States* v. *Virgen-Moreno*, 265 F.3d 276, 289 (5th Cir. 2001). That is why no case in American jurisprudence has ever permitted the substitution of multiple jurors over a defendant's objection after eight days of deliberations. Yet after the decision below, courts, particularly those in the Seventh Circuit, will be free to do just that, and worse.

2. Nothing in the text, commentary or history of the Federal Rules of Criminal Procedure suggests that the 1999 amendment to Rule 24 altered the constitutional confines. Quite the contrary, the commentary to its counterpart, Rule 23, expressly recognizes the great potential for prejudice in substitution:

> The central difficulty with substitution, whether viewed only as a practical problem or a question of constitutional dimensions (procedural due process under the Fifth Amendment or jury trial under the Sixth Amendment), is that there does not appear to be any way to nullify the impact of what has occurred without the participation of the new juror. Even were it required that the jury "review" with the new juror their prior deliberations or that the jury upon substitution start deliberations anew, it still seems likely that the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations.

Fed. R. Crim. P. 23(b) advisory committee's note. As amended, Rule 24(c)(3) is best construed to permit substitution of deliberating jurors *only* if that can be accomplished without compromising a defendant's constitutional right to a unanimous verdict from an impartial jury. See Fed. R. Crim. P. 24(c)(3); U.S. Const. amend. VI. In rejecting this view, however, the Seventh Circuit essentially held that the Rule authorizes a violation of the Constitution.

This manipulation of the jury's composition deprived the Petitioners of the fundamental right to a fair trial by an impartial jury. Indeed, before the district court took the unprecedented step of substituting two alternate jurors after eight days of deliberations, it recognized the enormous potential for prejudice, calling the decision "difficult," "extraordinary,"

"tough," "an extremely close call," and one that can be "very, very, very legitimately criticized." 3/28/06 Tr. at 24725, 24803. The jurors already had spent eight tumultuous days in heated arguments about the evidence. They already had sought the court's guidance in repeated confusion about the instructions. The jurors already had deliberated to verdict on several counts. They already had witnessed an effort to purge a juror through extrinsic legal research and a request for her removal. The jurors already were questioned about falsity in their questionnaires, and heard of the tremendous media scrutiny focused exclusively upon them.

3. This Court has never addressed the constitutionality of Rule 24 or the correct standard governing the removal and substitution of deliberating jurors. There is a compelling need for guidance.

For one thing, the Circuits are in open conflict over the standard governing the removal of a holdout juror. The Second, Ninth and District of Columbia Circuits have held that it is improper and unconstitutional to remove a juror if there is an objective *possibility* that the juror's dismissal was prompted by the juror's doubts as to the defendant's guilt. See *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987) ("[I]f the record evidence discloses any possibility that the request to discharge stems from the juror's views of the sufficiency of the government's evidence, the court must deny the request."); *United States* v. *Thomas*, 116 F.3d 606, 622 (2d Cir. 1997) ("adopt[ing] the *Brown* rule as an appropriate limitation on a juror's dismissal"); *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) ("[I]f the record evidence discloses any reasonable possibility that the impetus for the juror's dismissal stems from the juror's views

on the merits of the case, the court must not dismiss the juror."). The Eleventh Circuit, for its part, has held that a district court may dismiss a juror unless the record demonstrates a "substantial basis" that dismissal stemmed from the juror's view of the evidence. *United States* v. *Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001).

In this case, the Seventh Circuit has articulated a conflicting standard and held that the "defendants have the burden of demonstrating on appeal that there was no legitimate basis in the record" for the removal of the original jurors and substitution of alternates. App. 36a. The Fifth Circuit has adopted a similar view. *United States* v. *Edwards*, 303 F.3d 606, 633-34 (5th Cir. 2002). According to the Seventh Circuit, the prosecution's motivation for seeking the removal of a juror is irrelevant so long as there is a basis in the record to support the district court's action. App. 31a.

While there are few cases addressing substitution, the Circuits are in disarray on that question as well. Some older cases have held that the potential for prejudice from the substitution of an alternate must be analyzed for a *reasonable possibility of prejudice* — not actual prejudice. See, *e.g.*, *United States* v. *Register*, 182 F.3d 820, 843 (11th Cir. 1999) (the pertinent inquiry is "whether the record indicates a reasonable possibility of prejudice to the defendants"). Other courts have analyzed substitution of deliberating jurors in light of objective criteria to evaluate actual prejudice, such as the risk of external influence on alternates prior to substitution and the length and apparent extent of the original deliberations. See *United States* v. *Josefik*, 753 F.2d 585, 587 (7th Cir. 1985). But now, the Seventh Circuit has departed

from that approach by concluding that prejudice stemming from the substitution of an alternate is of no consequence absent an explicit violation of the amended Rule 24. App. 34a.

This conflict over the proper application of Rule 24 and the removal and substitution of jurors should be resolved by this Court. The conflicting appellate court opinions demonstrate real confusion, and the removal issue is one that has recurred with some frequency.

II. The Seventh Circuit's Holding That The Interrogation Of Deliberating Jurors About Their Own False Statements In Front Of Prosecutors Does Not Irreparably Taint The Verdict Warrants This Court's Review

The Seventh Circuit's holding on the second question presented — sustaining the verdict despite the interrogation of deliberating jurors about their misconduct in front of prosecutors — also merits review. The Sixth Amendment guarantees an accused the right to a trial before an impartial jury. U.S. Const. amend. VI. Certain constitutional errors, by their nature, "defy analysis by 'harmless-error' standards." *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991). "Each of these constitutional deprivations is a . . . structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310.

1. As this Court has said, "[a]mong those basic fair trial rights that 'can never be treated as harmless' is a defendant's 'right to an impartial adjudicator, be it judge or jury.'" *Gomez* v. *United States*, 490 U.S. 858, 876 (1989) (citation omitted). Any attempt to apply harmless-error analysis would amount to

"pure speculation" as to what would have occurred in the absence of the error. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993).

Moreover, the hallmark of impartiality is, as Judge Learned Hand observed, that jurors "are in no wise accountable, directly or indirectly, for what they do." *United States ex rel. McCann* v. *Adams*, 126 F.2d 774, 775 (2d Cir. 1942). Indeed, the practice of punishing jurors related to their service was abandoned more than three centuries ago: since "the famous opinion in *Bushnell's Case*, 124 Eng. Rep. 1006 (C.P. 1680) . . . jurors have been protected from being called to account for their verdicts." *United States* v. *Thomas*, 116 F.3d 606, 615 (2d Cir. 1997).

By contrast, where jurors fear repercussions from their deliberations — not to mention possible prosecution — they cannot fairly determine the outcome of the case. The threat of punishment works a coercive influence on the jury's independence, and jurors fearing possible prosecution for their own misdeeds during the trial cannot be impartial jurors. That is because of the significant risk that jurors who are the subject of law enforcement scrutiny during deliberations in a criminal case will seek to please the prosecution and vote to convict.

That was the essence of this Court's holding in *Remmer* v. *United States*, 347 U.S. 227 (1954) ("*Remmer I*"), which questioned a juror's ability to deliberate freely when questioned by law enforcement during a trial:

> The sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A

> juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder.

Id. at 229. *Remmer I* was decided before "structural error" came into this Court's lexicon. But significantly, while *Remmer I* ordered a remand for the purpose of establishing prejudice, this Court in subsequent proceedings ("*Remmer II*") ordered a new trial even over the lower court's finding of no prejudice. 350 U.S. 377, 381-82 (1956).

This is consistent with the Court's subsequent decisions related to the fundamental right to trial before unbiased jurors. *Gomez*, 490 U.S. at 876. Errors that implicate such a basic trial right — the right to an impartial jury — are structural defects that render a criminal trial fundamentally unfair and an unreliable vehicle for determining guilt or innocence.

2. Here, the Seventh Circuit adopted an unduly restrictive legal standard in failing to consider the government's offer of immunity during juror interrogations as error — structural or otherwise. App. 64a-68a. Indeed, the Seventh Circuit dismissed the issue raised in the Petitioners' opening brief on appeal as a "modest point" even as it struggled to distinguish *Remmer I*. App. 67a-68a. But *over half* the deliberating jurors had made misstatements in voir dire about prior arrests and convictions, and were questioned about those misstatements by the district court in the presence of federal prosecutors. App. 71a. At the time of those interrogations, local media in Chicago advocated perjury prosecutions of the jurors, and at least three jurors retained legal counsel in connection with their jury service. The district court's questioning of jurors in the presence of federal prosecutors

raised the specter of perjury prosecutions such that the court and counsel considered whether the jurors should be advised of their rights. App. 76a. Indeed, the United States Attorney on his own accord offered a grant of immunity to jurors "going forward."[2] App. 77a-78a.

There can be no confidence in a jury's verdict where the verdict was "delivered by a jury whose number included some who themselves faced potential criminal prosecution for their actions that occurred during this trial." App. 74a. As Judge Posner concluded, not only did the jurors' misrepresentations "cast doubt on the jurors' ability to serve, but the court's grilling of the jurors on this topic may have prevented them from performing their duty conscientiously and undistractedly":

> They faced potential prosecution by a *party* to the case — the federal government. They may have feared perjury charges, having seen first-hand in the trial that the government prosecutes people for making false statements. Had the government fully immunized the jurors from prosecution, and had the jurors known this, there is the considerable risk that they would have been biased in favor of the government. But even if the jurors did not know that any

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[2] Despite the prosecution's decision to grant blanket immunity, the offer was conveyed to only one juror. This selective disclosure of immunity is itself problematic, with the other jurors inevitably wondering why they were not afforded immunity when one of their peers was specifically guaranteed that "nothing that you say here is going to be used against you in any way." 3/27/06 Tr. at 24502.

> offer of immunity had been made, they may have decided to convict the defendants in order to avoid provoking the government's ire and inviting a retaliatory prosecution of them (the jurors). The government's attempt to immunize jurors itself suggests the proceedings were broken beyond repair.

App. 98a-99a (emphasis in original). Indeed, the entire process of removing and replacing deliberating jurors was so fundamentally flawed as to undermine the basic fairness of the proceedings. The inherently prejudicial interrogation of deliberating jurors, the extraordinary confusion over the standard for removing jurors and the notes revealing an apparent split on the jury made it impossible to fairly reconfigure the jury eight days into deliberations.

The dissenting judges below concluded that structural error treatment was particularly appropriate — and that the majority's opinion to the contrary[3] squarely conflicted with this Court's precedent — because of the inability to quantitatively assess or discern actual prejudice. *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 n.4 (2006) (resting "con-

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[3] The majority's suggestion of waiver is questionable in itself. This Court expressly left open whether reversal is required when an error is structural but unpreserved. *United States* v. *Olano*, 502 U.S. 725, 735 (1993). Subsequent to *Olano*, some Circuits have suggested that certain structural errors may be unwaivable. See, *e.g.*, *United States* v. *Nelson*, 277 F.3d 164, 205 (2d Cir. 2002) (Calabresi, J.) ("[T]he right to an impartial fact finder might be inherently unwaivable."); *United States* v. *Vasquez*, 271 F.3d 93, 100 (3rd Cir. 2001). Other Circuits have taken a contrary view. See, *e.g.*, *United States* v. *Recio*, 371 F.3d 1093, 1100 n.4, 1101, 1103 n.7 (9th Cir. 2004); *United States* v. *David*, 83 F.3d 638, 647 (4th Cir. 1996).

clusion of structural error upon the difficulty of assessing the effect of the error"). Indeed, that was patently apparent in the district court's response to defense counsel's repeated objections on this very issue[4]: "The . . . argument you are making is that we now have a bunch of fearful jurors. I just don't know how to address that." 3/28/06 Tr. at 24699.

But the answer is simple. In a case such as this, in which jurors are questioned in the presence of prosecutors about the jurors' own conduct, the risk is simply too great that they will not be fair to the defendant. The Seventh Circuit's refusal to recognize

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[4] Before the district court reconstituted deliberations, the defense argued that the jurors "may well be terrified that the U.S. government is looking at them":

> DEFENSE COUNSEL: [T]hese jurors now are under investigation . . . . And there is not a chance in the world that they are going to vote for defendant when they think that the federal government is looking at them the way that they looked at these others.
>
> They have sat there for six months and watched a defendant be prosecuted and going to be sent to jail, in the government's view, because he did exactly what they might have done, and they know they did. And they are not going to put themselves in that position by going against the government, even if they feel in their heart that they should. That's the realistic outcome.
>
> ****
>
> And these jurors were visibly frightened. And if you think for one minute that that fear is going to help the defense, I beg to differ with you.
>
> When a jury is afraid, they vote with the prosecution . . . .

3/28/06 Tr. at 24692, 24698.

that reality, and the risk that it will escape recognition by that and other courts throughout the Seventh Circuit, warrants this Court's review.

III. The Seventh Circuit's Decision Refusing Cumulative Error Analysis Conflicts With The Law Of Other Circuits And Is Starkly Inconsistent With This Court's Precedent Concerning Fundamental Trial Rights

The Seventh Circuit's refusal to engage in cumulative error analysis likewise warrants this Court's review. Due process guarantees a criminal defendant a fair trial free from prejudicial error, U.S. Const. amend. V, and this necessarily extends to a trial free from *cumulative* error.

1. The Seventh Circuit, however, has adopted a minority view in refusing to consider the permeating effect of jury and other trial errors. With the decision below, the Seventh Circuit has now joined the Sixth Circuit in refusing cumulative error review. App. 3a; *United States* v. *Roach*, 502 F.3d 425, 443 (6th Cir. 2007).

In direct conflict, the First, Second, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits hold that a cumulative error analysis is an implicit and indispensable step in determining whether a defendant's trial was rendered fundamentally unfair. See *United States* v. *Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993) ("A reviewing tribunal must consider each such claim against the background of the case as a whole . . . ."); *United States* v. *Grunberger*, 431 F.2d 1062, 1064 (2d Cir. 1970) (holding that the cumulative effect of errors "when viewed in the light of the trial posture of the case as a whole requires a reversal . . . ."); *United States* v. *Munoz*, 150 F.3d 401, 418 (5th

Cir. 1998) ("[A]n aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal."); *United States* v. *Steffen*, 641 F.2d 591, 598 (8th Cir. 1981) (explaining that the court will reverse where "the case as a whole presents an image of unfairness" even though none of the claimed errors alone is sufficient to require reversal); *United States* v. *Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988) (finding that a "balkanized, issue-by-issue harmless error review" would not be "very enlightening in determining whether the appellants were prejudiced by the errors" because "[a]lthough each of the . . . errors, looked at separately, may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted"); *United States* v. *Rivera*, 900 F.2d 1462, 1470, 1477 (10th Cir. 1990) (en banc) ("Unless an aggregate harmlessness determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless."); *United States* v. *Vasquez*, 225 F. App'x 831, 836 (11th Cir. 2007) (unpublished decision) ("In addressing a claim of cumulative error, we must examine the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial.") (citation omitted).[5]

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[5] The Circuits are divided as to whether a finding of a "single" error precludes cumulative error analysis, but even a single error can violate a defendant's right to a fair trial. Indeed, in contrast with the Seventh Circuit, other Circuits have considered whether prejudicial circumstances — in addition to errors — imperiled the fundamental fairness of the trial. Compare *United States* v. *Allen*, 269 F.3d 842, 847 (7th Cir. 2001) ("[E]ven if we found it to be error, it would amount to the only error in

2. Nor can there be any doubt that this case provides a good vehicle for resolving the disagreement and confusion on the necessity of cumulative error review. In its desire to secure verdicts after such a lengthy trial, the district court here committed what the Petitioners in their brief on appeal termed "an avalanche of errors" that individually and collectively deprived the Petitioners of their constitutional rights to a fair trial before an impartial jury. And a litany of jury-related problems undoubtedly infected this trial: a group of jurors sought to remove a defense holdout; at the urging of others, a juror conducted legal research on the removal of jurors and used it in deliberations to threaten the holdout; the juror who brought extrinsic research into the jury room, and those who encouraged her to commit that misconduct, remained on the jury and deliberated until verdict; half of the jurors failed to disclose prior arrests and convictions on their questionnaires; for days, deliberations were halted and jurors questioned about their false answers in the presence of federal prosecutors; two jurors who had participated in eight days of deliberation were removed; and two alternate jurors

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this case, completely precluding a finding of cumulative error."), with *United States* v. *Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993) ("Even if a particular error is cured by an instruction, the court should consider any 'traces' which may remain" when reviewing for cumulative error.); *Rivera*, 900 F.2d at 1471 n.8, 1477 (noting that courts have found fundamental unfairness when error is considered in conjunction with other prejudicial circumstances, but declining to explore the outer parameters of when prejudicial circumstances are included in a cumulative impact analysis); and *United States* v. *Diharce-Estrada*, 526 F.2d 637, 642 (5th Cir. 1976) ("Based upon the combination of errors and prejudicial circumstances recited, this court is left with the definite and firm conviction that [defendant] did not receive a fair trial.").

were substituted after a two-and-a-half-week absence from the courthouse (including one who had been questioned about his failure to disclose a criminal conviction).

In discarding a cumulative error analysis, the Seventh Circuit has impermissibly narrowed the scope of appellate review by considering each error in isolation and declining to consider their aggregate effect. App. 3a. The decision eviscerates a criminal defendant's basic rights to a fair trial and impartial jury by improperly circumscribing the scope of appellate review. As Judge Posner noted in dissent, "harmlessness" of an individual trial error viewed in isolation "is not the test of reversible error when a cascade of errors turns a trial into a travesty." App. 97a. Further, Judge Posner concluded, "the panel majority opinion, unless set aside, will be read as an endorsement of laissez-faire appellate review" and "will have the force of precedent in future cases." App. 83a.

3. The minority view adopted by the Seventh and Sixth Circuits is also in open tension with this Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946), which described a reviewing court's obligation to consider claims of error "not singled out and standing alone, but in relation to all else that happened":

> But if one cannot say, with fair assurance, after *pondering all that happened without stripping the erroneous action from the whole*, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there*

> *was enough to support the result, apart from the phase affected by the error.* It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 765 (emphases added). The Seventh Circuit's decision to limit its "review of the trial proceedings" to "particular" errors considered in isolation is incompatible with the clear and unambiguous statement of controlling law from *Kotteakos* and other decisions from this Court.

Indeed, this Court has since reaffirmed the principle that the right of an accused in a criminal trial to due process requires a cumulative error analysis. In *Chambers* v. *Mississippi*, the Court held that a trial was rendered fundamentally unfair as a result of the cumulative effect of several evidentiary rulings. 410 U.S. 284, 302-03 (1973). Similarly, the Court held in *Taylor* v. *Kentucky* that cumulative error could render a trial fundamentally unfair: "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness." 436 U.S. 478, 488 n.15 (1978). This precedent is predicated on the sound recognition that errors, while individually harmless when viewed in isolation, can nonetheless in the aggregate violate a defendant's due process rights just as much as a single reversible error. Due process requires a reviewing court to assess the harm done by the errors considered in the aggregate. As Judge Posner noted in his dissent, "harmlessness is not the test of reversible error when a cascade of errors turns a trial into a travesty." App. 97a.

4. The significance of the Seventh Circuit's failure to conduct a cumulative error analysis is particularly acute here because the errors in question directly related to the jury, the integrity of its deliberations and the impartiality of its members. There is, as Judge Posner described, "an independent judicial interest in the proper functioning of the adjudicative process" which is "at its zenith in a criminal jury trial." App. 97a. Indeed, two hundred years of precedent from this Court has assiduously guarded an accused's right to a fair trial and impartial jury. See, *e.g.*, *Blakely* v. *Washington*, 542 U.S. 296, 305-06 (2004) ("[T]he right of jury trial . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."); *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors . . . ."); *Smith* v. *Phillips*, 455 U.S. 209, 231 (1982) (Marshall, J., dissenting) ("The right to a trial by an impartial jury is too important, and the threat to that right too great, to justify rigid insistence on actual proof of bias. Such a requirement blinks reality."); *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968) ("[T]rial by jury in criminal cases is fundamental to the American scheme of justice . . . ."); *Sheppard* v. *Maxwell*, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences."); *Turner* v. *Louisiana*, 379 U.S. 466, 471-72 (1965) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."); *United States* v. *Cornell*, 25 F. Cas. 650, 655-56, No.14,868 (C.C.D.R.I. 1820) ("To insist on a ju-

ror's sitting in a cause when he acknowledges himself to be under influences . . . would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice."); *United States* v. *Burr*, 25 F. Cas. 49, 50, No. 14,692g (C.C.D. Va. 1807) ("The great value of the trial by jury certainly consists in its fairness and impartiality.").

This clear and express conflict in the law of the Circuits on a question as fundamental as the role of cumulative error analysis warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

VOLUME I of II

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 06-3517 & 06-3528

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAWRENCE E. WARNER and
GEORGE H. RYAN, SR.,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 02 CR 506-1, 4—**Rebecca R. Pallmeyer**, *Judge.*

ARGUED FEBRUARY 20, 2007—DECIDED AUGUST 21, 2007**
OPINION PUBLISHED SEPTEMBER 6, 2007

Before MANION, KANNE, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* This appeal comes to us after an investigation that lasted for years and a jury trial that lasted more than six months. In the end, the two defendants, former Illinois Governor George H. Ryan, Sr., and his associate Lawrence E. Warner, were convicted on various criminal charges. The case attracted a great deal of public attention, and thus the district court handling the trial had to

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** This opinion was originally released in typescript on August 21, 2007.

handle a number of problems, some of which were common and others less so. The fact that the trial may not have been picture-perfect is, in itself, nothing unusual. The Supreme Court has observed more than once that "taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and ... the Constitution does not guarantee such a trial." *United States v. Lane*, 474 U.S. 438, 445 (1986) (quoting *United States v. Hasting*, 461 U.S. 499, 508-09 (1983)). It is our job, in this as in any other criminal appeal, to decide whether any of the court's rulings so impaired the fairness and reliability of the proceeding that the only permissible remedy is a new trial.

Defendants Warner and Ryan raise eight grounds on appeal, six of them common and one argument unique to each. Their primary emphasis is on specific issues about the jury. They contend that the verdict was tainted by jurors' use of extraneous legal materials. They characterize the dismissal of a juror as an "arbitrary removal of a defense holdout." They object to the substitution of jurors after deliberations had begun. They also raise claims unrelated to the jury, including the arguments that the exclusion of certain evidence was an "erroneous exclusion of exculpatory evidence, that the prosecution failed to identify an "enterprise" for purposes of its charges under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, and that the mail fraud charges were grounded in an "unconstitutionally vague criminal statute," see 18 U.S.C. § 1346. Warner additionally objects to the joinder of his trial with Ryan's, and Ryan argues that

certain grand jury testimony violated his attorney-client privilege.

Some potential issues, we note, are not before us. The defendants do not argue that the problems with the jury had a cumulative, prejudicial effect, even though they made this argument in their motion for a new trial before the district court. Nor do they claim that the evidence was insufficient to support any of the charges on which they were convicted. Rather, their appeal is focused on particular alleged procedural and legal errors. As we would in any case, we review only those issues presented to this court. We conclude that the district court handled most problems that arose in an acceptable manner, and that whatever error remained was harmless. We therefore affirm the convictions.

I

The facts of this case are well-known, and so we recite only what is necessary to understand the issues on appeal. In December 2003, a grand jury returned a 22-count indictment against Warner and Ryan. After a lengthy trial, on April 17, 2006, a jury found Warner and Ryan guilty on all counts. On September 18, 2006, the district court set aside the jury's verdict with respect to two separate mail fraud counts against Ryan and then entered judgment against both defendants on the remaining counts. The court sentenced Warner to 41 months' imprisonment and Ryan to 78 months' imprisonment. The defendants both filed timely notices of appeal on September 20, 2006.

The story behind this case began in November 1990 when Ryan, then the Lieutenant Governor of Illinois, won election as Illinois's Secretary of State.

He was re-elected to that post in 1994. Throughout Ryan's two terms in that office, Warner was one of Ryan's closest unpaid advisors. One of Ryan's duties as Secretary of State was to award leases and contracts for the office, using a process of competitive bidding for major contracts and selecting leases based on the staff's assessments of multiple options. Improprieties in awarding four leases and three contracts form the basis of the majority of the RICO and mail fraud counts against Warner and Ryan, as these leases and contracts were steered improperly to Warner-controlled entities. The result was hundreds of thousands of dollars in benefits for Warner and Ryan. These benefits included financial support for Ryan's successful 1998 campaign for Governor of Illinois.

Prospective jurors for the trial in this case filled out a 110-question, 33-page form, which covered among many other topics the subjects of their criminal and litigation histories, their knowledge of the investigation of Ryan, and their awareness of Ryan's positions on public issues. Counsel for all parties and the court reviewed the questionnaires for four days; voir dire consumed another six days. The district court seated 12 jurors and eight alternates. The trial lasted six months. The prosecution presented approximately 80 witnesses against the defendants. In the end, the evidence supporting the jury's verdict was overwhelming. We give only a few examples here from the extensive record that was created. To begin with, the evidence showed that Ryan steered an $850,000 four-year Secretary of State's office lease to Warner for a property that Warner had recently purchased for just $200,000. Ryan took regular Jamaican vacations paid for by a

currency-exchange owner to whom Ryan later steered a $500,000 six-year Secretary of State's office lease. Ryan took a Mexican vacation paid for by an individual to whom Ryan later steered another Secretary of State's office lease and a lobbying contract worth nearly $200,000 for virtually no work. Warner received more than $800,000 for helping a company land a major Secretary of State's office contract without registering as a lobbyist and added another of Ryan's friends into the arrangement at Ryan's request before the contract was awarded. Finally, and remarkably, despite evidence showing that they were enjoying a very nice lifestyle, Ryan's and his wife's total withdrawals from their bank accounts averaged less than $700 per year for ten years.

The jury retired on March 13, 2006. This jury deliberated for eight days. During their deliberations, the jurors were allowed occasional breaks so that some jurors could smoke outside. At the same times, some of the other jurors would go outside for fresh air or walk up and down the courthouse stairwells for exercise. No one formally objected to the court about these activities. On at least one occasion, the court noted that the jurors were accompanied by court personnel when on breaks. Putting media accounts and testimony that the district court discredited to one side, there is no basis in the record to conclude that any deliberations took place when the jurors were separated from one another.

It was not long before problems arose. On Monday, March 20, 2006, Juror Ezell sent the court a note, also signed by the foreperson, complaining that other jurors were calling her derogatory names and shouting profanities. The court conferred with

counsel and responded with a note instructing the jurors to treat one another "with dignity and respect." Two days later, the court received a note from Juror Losacco signed by seven other jurors, asking if Juror Ezell could be excused because she was refusing to engage in meaningful discourse and was behaving in a physically aggressive manner. The court again conferred with counsel, noting that "[Losacco] has not told us anything about the way the jury stands on the merits. She really has not." The next morning the court responded with a note, which began "You twelve are the jurors selected to decide this case." The note then reiterated that the jurors were to treat each other with respect and reminded them of their duties.

On the eighth day of deliberations, a few hours after the court responded to the Losacco note, media reports surfaced claiming that one of the jurors had given untruthful answers on the initial juror questionnaire regarding his criminal history. The court stopped the jury's deliberations while it looked into the new allegations, After a background check confirmed that Juror Pavlick had not disclosed a felony DUI conviction and a misdemeanor reckless conduct conviction, the court questioned him individually. The court asked counsel if there would be any objection to dismissing Pavlick. Neither the prosecutor nor Ryan's counsel voiced any objection when Warner's counsel moved to dismiss Pavlick or when the court granted that motion.

It turned out that Juror Ezell's record was also problematic. A background check turned up seven criminal arrests, an outstanding warrant for driving on a suspended license, and an arrest under a false name, "Thora Jones." The fingerprints of the "Thora Jones" arrestee matched Ezell's, and it turned out

that the name "Thora Jones" might belong to Ezell's daughter, who also has a significant criminal history. The government told the court that it would have moved to excuse Ezell for cause had it known during voir dire that she had given law enforcement officers false booking information, as the Ryan-Warner case also involved charges of providing false information to law enforcement officers. The court replied that "I suspect there would not have been an objection [to that cause challenge]. She would have been excused." The court proceeded to question Ezell, who acknowledged her untruthfulness. Even then, however, she was not forthcoming about her use of the name "Thora Jones" nor about her daughter's criminal history. The court concluded that "some of the answers she just gave me ... aren't truthful." Warner's counsel agreed that Ezell should be excused, while Ryan's counsel took no position initially. When the government moved to dismiss Ezell, Ryan's counsel objected to the standard employed but did not object to the decision to remove Ezell based on her untruthfulness.

The court also questioned a number of other jurors. It turned out that Jurors Gomilla and Talbot both had filed for bankruptcy in the mid-1990s, but neither included this information in response to a question about whether they had ever appeared in court or been involved in a lawsuit. That question, however, appeared in a section entitled "Criminal Justice Experience." Several other jurors had also left that question blank: Juror Svymbersky, an alternate, who stole a bicycle at age 18 or 19 in 1983 and thought that the charges had been expunged; Juror Rein, who was arrested for assault for slapping his sister in 1980, but never appeared in court; Juror

Casino who had three arrests that he had not remembered when filling out the questionnaire, because they occurred forty years earlier, in the 1960s, when he was in his early 20s; and Juror Masri, an alternate, who reported a 2000 DUI conviction but had said nothing about a 2004 DUI conviction nor about his conditional discharge or probation in September 2005.

The defense argued that Svymbersky, Rein, Casino and Masri should be dismissed for dishonesty, while the government took the position that all four were fit to serve. The district court initially was inclined to excuse Svymbersky and Masri, but it chose to re-interview Casino and Svymbersky, who both again stated that they had not recalled the incidents when filling out their questionnaires. The district court credited the testimony of Svymbersky, Rein, and Casino, concluding that they did not lie to the court. The district court did not credit Masri's testimony and excused him; no one objected. (We acknowledge the dissent's concern that the court did not state explicitly that it was granting the defendants' motion to excuse Masri for cause. Looking at the record as a whole, however, it is clear that this is what the court did. There was no other motion related to Masri pending, and the court had stated that jurors would be dismissed only for cause. If the court was not excusing Masri for cause, but instead seating alternates out of order, Masri would have remained an alternate as opposed to being excused. More importantly, though, no one has objected to the characterization of Masri's dismissal as one based on cause.)

In light of the dismissals, it became necessary to seat alternates Svymbersky and DiMartino on the

jury in place of Ezell and Pavlick. At that point, as authorized by Fed. R. Crim. P. 24(c)(3), the court decided that the reconstituted jury would need to start its deliberations from scratch. It questioned each of the remaining original jurors to ensure that they understood their obligation to disregard whatever had gone on before and to begin deliberations anew, and that they felt capable of doing so. They all answered yes. The court then re-read its instructions to the reconstituted jury, adding a new one to allay defense concerns with the questioning about the jurors' criminal histories. The new jury begin deliberating on March 29, 2006. After ten days' work, it returned guilty verdicts on all counts on April 17, 2006.

After the verdict, dismissed juror Ezell publicly criticized the jury and the verdict. On April 25, 2006, defense counsel asked the court to conduct a formal inquiry into her comments. On April 26, the court held a hearing on the motion in open court, during which the government noted that "nothing that [Ezell] has said ... indicated any extraneous influence occurred." The court determined that "the allegations that Ms. Ezell appears to be making [do not] constitute the kind of misconduct [that would require an inquiry]." At some point later that day or the next day, defense counsel learned through new media reports that Ezell had alleged that Juror Peterson had brought "case and law" into the jury room about removing a juror for failing to deliberate. Defense counsel filed a new motion for an inquiry, which the court granted. On May 5, 2006, the court opened its inquiry into Ezell's allegations, interviewing both Ezell and Peterson. Ezell told the court that she had previously forgotten about "the case law" to explain

why she had not previously mentioned the incident. Peterson acknowledged bringing into the jury room an article published by the American Judicature Society (AJS) (which she found by conducting a Google search of the term "deliberating") about the substitution of jurors and a handwritten note recording her own thoughts about the duty to deliberate. She read a portion of the article and the handwritten note to the rest of the jurors. The court concluded that these two excerpts "did not prejudice the outcome" and ultimately denied the defendants' motion for a new trial on that (and several other) grounds.

II

Both Warner and Ryan assert that the court's ruling on this "extraneous evidence" was wrong, prejudicial, and requires a new trial. A preliminary question that influences the rest of the analysis is whether either one, or both, of these items should be characterized as "extraneous" evidence. The district court concluded that the AJS article was, but that Juror Peterson's personal note was not.

A

Read in isolation, Peterson's note is hard to criticize. It said:

> You have the right to speak your opinion, but you have responsibility to use the facts[,] the testimony to support your opinion to seriously consider [sic]. If you don't use evidence and testimony to support your opinion your [sic] not being responsibly [sic].

The proper characterization of this note is a question of fact, which we review for clear error.

United States v. Mancillas, 183 F.3d 682, 695 (7th Cir. 1999). Juror Peterson told the district court that her handwritten statement came from her own, independent thoughts. The district court credited that testimony, noting the lack of overlap between the subject of the AJS article and Peterson's note as well as the similarities between Peterson's note and the court's instructions to the jury on their duty to deliberate.

Credibility findings are "binding on appeal unless the district judge has chosen to credit *exceedingly* improbable testimony." *United States v. Hubbard*, 61 F.3d 1261, 1278 (7th Cir. 1995) (emphasis in original). There is no reason to question the district court's assessment of Juror Peterson's explanation about the note, let alone any indication that Peterson's account was "exceedingly improbable." The defendants' trial counsel were present when the district court discussed the note with Peterson and were permitted to ask questions. The defendants imply that Peterson could not have composed the note without assistance from external sources, apparently on the theory that it expressed concepts beyond the capability of a kindergarten teacher (which is Peterson's profession). We cannot imagine why either we or the district court was required to draw any such inference, which is more than a little patronizing. Thus, the defendants are left only with the fact that Peterson put her thoughts on paper. Had she simply spoken those words to the jury without writing them first, Fed. R. Evid. 606(b) would bar any consideration of them at all. We conclude that the district court did not err in determining that this note was not extraneous information and did not require any further action.

B

The AJS article was indisputably extraneous information in the jury room. It dealt generally with the subject of juror removal and substitution. The excerpt that Peterson read to the jury was the following:

> But other bases for substitution raise serious questions about the sanctity of the deliberative process, primarily allegations by some jurors that another juror is unwilling or unable to meaningfully deliberate, or is unwilling to follow the law. Such an allegation requires a hearing where the judge must decide the tricky question whether the juror is truly unfit to serve, or is merely expressing an alternative viewpoint that will likely result in a hung jury. Only if the judge concludes that the challenged juror is truly unfit to serve, will the judge be authorized to dismiss that juror and substitute an alternate juror.

In essence, Peterson's act of reading that paragraph introduced new instructions into the jury room about the deliberative process, beyond those given by the court. There is no doubt that this should not have happened. The only question is whether it is such a fundamental error that it requires automatic reversal, or if it is subject to harmless error analysis.

The Supreme Court has repeatedly stressed the fact that so-called structural errors—those that fall outside the boundaries of harmless error analysis—are few and far between. Most recently, the Court found that a constitutional error in failing properly to apply the rule of *Blakely v. Washington*, 542 U.S. 296 (2004), was subject to harmless error analysis. See

Washington v. Recuenco, 126 S.Ct. 2546 (2006). The Court explained:

> We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "'most constitutional errors can be harmless.'" *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" 527 U.S. at 8 (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)). Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal.

126 S.Ct. at 2551 (footnote deleted). In a footnote, the Court reviewed the six "rare" areas where automatic reversal occurs: complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of the right of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. *Id.* at n.2. It also recalled that its earlier decision in *Neder* had involved defective jury instructions, and that it had applied harmless error analysis there. *Id.* at 2551.

The defendants do not contend that anything that *Recuenco* recognized as structural error occurred here. Instead their argument is about jury instructions and external influences on the jury. The Court repeatedly has subjected challenges to external influences on jurors to harmless error analysis. In

United States v. Olano, 507 U.S. 725, 738 (1993), it wrote that "[w]e generally have analyzed outside intrusions upon the jury for prejudicial impact." The Court summarized its "'intrusion' jurisprudence" by stating that "[d]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." *Id.* (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). Under *Neder* and similar cases, the introduction of the excerpt from the AJS article into the jury room is subject to harmless error analysis.

In evaluating it in this light, we bear two things in mind. First, we have held, and we reaffirm, that district courts "retain ... substantial discretion over the determination of whether the prejudice arising from the unauthorized contact is rebutted or harmless." *United States v. Sababu*, 891 F.2d 1308, 1335 (7th Cir. 1989); see also *Evans v. Young*, 854 F.2d 1081, 1084 (7th Cir. 1988). The relevant question is thus whether the court abused its discretion in making that determination. *Sababu*, 891 F.2d at 1334. Second, context matters. Many cases in which extraneous information made its way into the jury room involve evidence relevant to the defendant's guilt or innocence. See, *e.g.*, *United States v. Berry*, 92 F.3d 597, 600 (7th Cir. 1996) (unadmitted transcript of admitted recording that labeled one speaker as the defendant although identification was in dispute); *Sababu*, 891 F.2d at 1332-33 (unadmitted transcript of defendant's unadmitted recorded conversation with a codefendant); *United States v. Bruscino*, 687 F.2d 938, 941 (7th Cir. 1982) (*en banc*) (Bureau of Prisons document about the defendant's possible membership in prison gang and a newspaper

article about the case). The excerpt from the AJS article did not. Compare *United States v. Estrada*, 45 F.3d 1215, 1226 (8th Cir. 1995), *vacated on other grounds*, 516 U.S. 1023 (1995) (differentiating between external information that merely supplements the court's instructions and factual evidence not developed at trial).

We first consider whether the district court applied the proper legal standard for its inquiry. A district court's failure to use the proper legal standard is an abuse of discretion. *United States v. Austin*, 103 F.3d 606, 609 (7th Cir.1997). A district also abuses its discretion if the record contains no evidence on which the court could have relied or if its findings of fact are clearly erroneous. *United States v. Jain*, 174 F.3d 892, 899 (7th Cir. 1999).

This court has looked to the Supreme Court's decision in *Remmer v. United States*, 347 U.S. 227, 228 (1954), in order to develop a legal standard in this area. *Sababu*, 891 F.2d at 1335. In *Remmer*, the Court considered the case of a juror who supposedly was offered a bribe for a vote to acquit. 347 U.S. at 228. The FBI was brought in to question the juror, and the district court concluded that the bribe was a joke, but the defendant was never told about the allegation. *Id. Remmer* held that

> [i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and

> directions of the court made during the trial, with full knowledge of the parties.

Id. at 229. The Court also said, however, that "[t]he presumption is not conclusive, but the burden rests heavily on the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Id.* It cautioned that inquiries of jurors about extraneous influences must strike a balance between the need to ensure that no prejudice has occurred and the need to let jurors deliberate unimpeded. *Id.*

District courts have some flexibility in structuring an inquiry into this kind of problem. *Bruscino*, 687 F.2d 938 at 940. Sometimes the circumstances are such that the *Remmer* presumption does not even apply. Thus, in *Whitehead v. Cowan*, 263 F.3d 708, 723 (7th Cir. 2001), we held that it did not apply to the publication of jurors' names and addresses by the media. *Whitehead* also suggested that "no *Remmer* hearing is necessary" where a "comment heard by a juror was ambiguous and innocuous." 263 F.3d at 725-26. We need not explore when a hearing may not be essential, however, since the district court held one here. The general rule is that the district court "'should determine the circumstances [surrounding the improper contact] and the impact thereof on the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.'" *Sababu*, 891 F.2d at 1335 (quoting *Remmer*, 347 U.S. at 230).

The defendants argue that this standard does not adequately protect the deliberative process. They urge the adoption of a standard under which "any reasonable possibility of prejudice" from the external

influence automatically entitles a defendant to a new trial. This, however, would represent a significant extension of the law. In our view, such an extension is not warranted and would in fact be inconsistent with the Supreme Court's approach to harmless error. If the district court is able to take remedial measures that remove the possibility of prejudice, or if it finds after a hearing that the Government has rebutted the presumption of prejudice, no new trial is required.

The district court described the approach it took to this issue as "a two-pronged inquiry." It said that it would determine "whether there was an extraneous influence on the jury, [and] whether from an objective perspective ... what happened was prejudicial." The parties agreed to the judge's approach. Moreover, in the court's memorandum and order denying the defendants' motion for a new trial, the district court explicitly discussed the requirements and holdings of *Remmer*, *Bruscino*, and *Sababu*, among other cases, concluding that "[p]rejudice to the defendants is presumed ... but is rebutted if there is no reasonable possibility that the verdict was affected by the contact." We are confident, in light of these statements, that the court identified the correct legal standard for its inquiry.

C

The question remains whether the court abused its discretion in applying the law. In *United States v. Sanders*, 962 F.2d 660 (7th Cir. 1992), we suggested a non-exclusive list of considerations that throw light on the question of prejudice. These factors "include [1] the extent and nature of the unauthorized contact, [2] the power of curative instructions, and [3] the responses of the jury." *Id.* at 669. We will follow that

check-list here, understanding of course that in the end this type of inquiry simply helps to ensure that neither the district court nor we have overlooked anything important.

As we noted earlier, the AJS article was unrelated to the facts of the case or the defendants' guilt, and thus was less likely to prejudice the jury's evaluation of the central issues in the case. Furthermore, it was only the jurors who sat on the original jury who were exposed to the article, and their exposure was brief.

The district court rejected the defendants' speculation that Peterson "believed this document was some sort of trump card in an ongoing dispute with [Juror] Ezell." The testimony was in conflict about how severe that dispute was: Ezell claimed that she cried after the AJS article was read to the original jury, while Peterson testified that no one responded emotionally at all. The district court concluded that the article "did not sway the course of deliberations" during the first jury's deliberations when it was read, nor (more importantly) did it "play any role in the reconstituted deliberations." In reaching this conclusion, the district court credited Peterson's testimony that Ezell did not change her approach to the deliberative process after the excerpt was read, and Peterson's testimony that she did not refer to the article at all during the reconstituted jury's deliberations. The defense cannot point to any evidence showing that the district court's conclusions about credibility of the jurors regarding the external information were clearly erroneous.

The district court also concluded that the AJS article "does not state or imply that jurors must reach any decision," and could not "lead a reasonable juror

to change his or her determination for fear of punishment." Rather, based on the court's instructions about deliberations, the "jurors may have reasonably believed, even without consulting extraneous material, that they could be removed if they refused to 'deliberate.'" This differs significantly from the situation faced by the Ninth Circuit in *United States v. Rosenthal*, in which a juror asked an attorney friend whether she had "any leeway" in following the court's instructions on the law and her friend advised her that she "could get into trouble" if she strayed from the instructions, which implies a more severe penalty than simply being removed from a jury. 454 F.3d 943, 950 (9th Cir. 2006).

We now come to what may be the most powerful reason for concluding that Peterson's reading of the paragraph from the AJS article did not prejudice the defendants: it occurred during the deliberations of the initial jury, and the district court took measures to assure that the new jury could and would put Round 1 behind them. After dismissing Ezell and Pavlick, the district court asked each one of the remaining original jurors individually if he or she could disregard the previous deliberations and start over. For example, the court asked one juror, "If I were to tell you that today we are bringing some other jurors back and you must start all over, is that something you think you can do?" and "Could you, do you believe, to the best of your ability, put out of your mind all the discussion that's happened in the last few days with your fellow jurors?" The juror responded, "Yes, I can. Put it over and just start new." The court continued, "Just start as though it never happened before?" The juror replied, "Yes." The court followed up yet again, "Any concerns about how

– the difficulty that that would present for you?" The juror responded, "None whatsoever. I have no problems with it."

We approved a similar manner of proceeding in *Sanders*. There, "[the contacted juror] explicitly testified that she could put this incident behind her and continue to serve impartially as a juror." *Sanders*, 962 F.2d at 670. We concluded that "[b]ecause of this explicit testimony and the careful inquiry of the district court, we are unable to say that the district court abused its discretion in accepting Juror Layton's sworn statements and allowing the trial to continue." *Id.* *Sanders* compared this situation with "pretrial voir dire," about which "the Supreme Court has held that the test for determining impartiality in a prospective juror is whether he or she can 'lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" *Id.* at 670, n. 10 (quoting *Murphy v. Florida*, 421 U.S. 794, 800 (1975)).

The court did not specifically instruct the remaining jurors to disregard the AJS article (as it had not yet come to light), but still the court trod carefully to avoid prying into the jury's earlier internal deliberations. This is because Fed. R. Evid. 606(b) provides that

> [u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or

> concerning the juror's mental processes in connection therewith.

The rule did not technically apply at the time of the new instructions to the remaining jurors, as the jury had not yet reached a verdict. The rule is based, however, on the "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Tanner v. United States*, 483 U.S. 107, 127 (1987). The court reasonably took care to abide by the spirit of the rule because the original jurors were going to return as part of the reconstituted jury. If by its inquiry the court sent the implicit message that future deliberations might not be secret, then we would be facing a different set of problems with the reconstituted jury's verdict.

Following the juror interviews, the district court made a precautionary statement to the new jury before instructing it:

> You may have heard by now that two of the original jurors in this case were excused from further jury service. I want you to know, as I've told some of you already, that the circumstances that brought about the fact that these two jurors were excused, *those circumstances were not prompted by any of the lawyers or by the parties in this case, nor by your previous deliberations*, those of you who were here. Rather, the inquiry was generated by members of the media.... I want you to know that in attempting to reach verdicts in this case you are answerable only to your own conscious [sic]. It is your job, and your job alone, to find the facts in this case and to apply the law that I

> have given you.... The fact that there have been circumstances that led to two jurors being excused should not in any way enter into your deliberations.... [I]t is imperative that you completely put your prior deliberations out of your mind. You must treat this case as if the prior deliberations did not occur. *You also should not discuss or mention any statements or comments made during the prior deliberations when you begin these new deliberations.*

(emphasis added).

There is a general presumption that juries follow their instructions. See, *e.g.*, *Penry v. Johnson*, 532 U.S. 782, 799 (2001), citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); see also *United States v. McClinton*, 135 F.3d 1178, 1189 (7th Cir. 1998). This presumption is only overcome if there is an "overwhelming possibility" that jury was unable to follow the instructions. *Greer v. Miller*, 483 U.S. 756, 767 n.8 (1987). Here it is hard to imagine instructions that would be better tailored to the issue of the AJS article, as well as to the other concerns about the original deliberations that the defendants allege. (The defendants' assertion that some of the jurors believed that they "could force the removal of a fellow juror" also falls in light of these instructions and the court's credibility findings.) During the post-trial proceedings, the district court once again concluded that "the court believes that the jurors who deliberated to verdict in this case were diligent and impartial.... They sat attentively through nearly six months of evidence.... The court believes these jurors made every effort to be fair, even amid extraordinary public scrutiny." This assessment is entitled to deference from us.

D

The defendants make one final argument about the alleged external influences on the jury. They claim that the district court "*acknowledged* presumptive prejudice, [but] it effectively required a showing of *actual* prejudice." We do not see it that way. The defendants are forgetting that there is a middle ground, in which the court finds presumptive prejudice, but it then goes on to find that the government has rebutted that presumption. After interviewing both Ezell and Peterson, the district court stated "I am comfortable, based upon what I have heard, at least at this point, that the jurors' brief consideration of that material did not [cause] prejudice." The court did not conclude that the defendants lost because they failed to show actual prejudice, or that it was their burden to do so. It found that the government satisfied *its* burden to show that there was no prejudice, as it is entitled to do under *Remmer*. For all of these reasons, the district court did not abuse its discretion in concluding that the extraneous information at issue did not prejudice the defendants.

III

At the outset of the trial, the district court empaneled eight alternates to the jury. In the end, most of these alternates were necessary to provide the defendants with a full jury. By the time the trial reached the jury deliberation stage, one juror had been excused for inability to serve—Juror McFadden, who was dismissed on the court's own motion because she had a medical condition that made her repeatedly fall asleep during the trial.

The revelations of the possible criminal records of some of the original jurors led, as we have said, to the district court's decision to excuse Jurors Pavlick and Ezell and to replace them with alternates. Defendants raise five arguments relating to the process of removal and replacement: first, they accuse the district court of misleading defense counsel about the standard that would be used for removing jurors; second, they assert that the court applied an arbitrary standard for dismissals; third, they claim that the prosecution knew that Ezell was a holdout juror for the defense at the time it moved for Ezell's removal; fourth, they speculate that the removal of Ezell chilled pro-defense jurors; and finally, they fear that the investigation into the jurors' backgrounds biased the jurors against the defense.

A

The most important question for purposes of this part of the appeal is whether the district court correctly decided to rely on the standard established in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), for assessing these various challenges to the jury. In *McDonough*, the Supreme Court held that an inaccurate answer on a jury questionnaire discovered after the verdict was returned could be grounds for a new trial only if the "correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. Defendants claim that this standard is inappropriate for pre-verdict removals because *McDonough* rested on the need for finality in a given jury's verdict. The implication of their position is that it is actually impossible to remove a juror for cause once deliberations have started. This is not the case, as Fed. R. Crim. P. 24(c)(3) illustrates. Furthermore,

most of the interests in finality recognized by *McDonough* have already accrued by the time a fully tried case is submitted to a jury. We can see no sense in a rule that forces the court to sit by idly, knowing that it ought to remove a juror, just so that the jury can return a verdict and the facts of *McDonough* will be replicated. The district court was correct to turn to *McDonough* for guidance on how to resolve the problems that had arisen.

B

The next question is whether the district court applied this standard consistently. When the possibility arose that some sitting jurors would need to be removed because of their criminal records, the court asked the attorneys for their thoughts on the standard to apply to possible removals. All attorneys responded with arguments to the court. Less than an hour later, the court informed counsel that it saw a difference between jurors such as Pavlick and Ezell, for whom there were significant disparities between the questionnaires and their recent criminal histories, on the one hand, and jurors such as Casino, who may simply have forgotten long past criminal histories or may not have understood what was required to be disclosed.

In the end, the district court concluded and repeatedly stated that the appropriate action would be to excuse any juror for whom the newly acquired information would have led to a challenge for cause by one of the parties that the court would have granted. The court announced that it would follow that standard even if the result was to reduce the number of jurors below the number required to reach a verdict. This is precisely what *McDonough* calls for:

changing the composition of the jury after the time for peremptory challenges has expired only if the "cause" standard is met. When faced with a post-trial argument about a juror, the Supreme Court has focused on the question whether a district court's ruling "result[ed] in the seating of any juror who should have been dismissed for cause," not on whether some other jury might also have been impartial. *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000).

Before Ezell was dismissed, the district court asked defense counsel if they were accepting its standard. The court again clarified the standard being used, stating that a juror's saying only that she did not understand a question, or a juror acknowledging that she may not have answered everything truthfully, might not be excusable solely for that reason. The government agreed and noted that even if it might have made a challenge for cause, the decision would have been the court's in the end. The defense counsel stated their disagreement "that that's the standard that should be applied," and again expressed a preference for removing any juror "the Court has found ... not [to be] truthful." When all was said and done, however, this was just a discussion about how to apply the *McDonough* standard to these facts. The court recognized this: in its order denying defendants' motion for a new trial, it reiterated that it had applied the *McDonough* standard to removing the contested jurors.

Ignoring this extensive exchange, the defendants claim that "the district court never made any findings with respect to any juror that would have constituted a valid challenge for cause." The record does not support that assertion. The dismissal of Ezell

provides a good example. After explaining the applicable standard, the district court said, "Let's just start with the use of an alias. I think that probably would have been a basis for cause...." Prior to Ezell's dismissal, the government told the district court that it would have challenged her for cause had it known that "she has an arrest with a false name" because "[h]ow somebody who gives law enforcement officers false information upon an arrest can possibly be an impartial juror in this case, where one of the charges is giving false information to law enforcement officers, is well beyond me." The prosecution added, "Judge, there would not have been a contest" and that it was "[n]ot even an issue" because the government would always challenge for cause under such circumstances. The court responded that "if ... there would have been a cause challenge, I suspect there would not have been an objection. She would have been excused."

Soon after saying that, the court questioned Ezell about her arrest under a false name and concluded that her response was not forthcoming. As the court put it, "[Ezell] has never told us the truth about the [false] name Thora Jones." After listening to the attorneys' arguments, the court said, "I think she has concealed a great deal of information. And the critical question is, had this question been answered, would it have been grounds for cause? I can't imagine that the answer is anything other than yes. I think I have to excuse her." This is enough to convince us that Ezell was removed because she would have been removable for cause. This case is not like *United States v. Harbin*, where the district court told the parties that jurors would be removed only for cause once trial began, but then it allowed the prosecution

to use a peremptory challenge to remove a juror during the trial. 250 F.3d 532, 547 (7th Cir. 2001). Based on the lengthy discussions among the court, the prosecutors, and defense counsel, it is apparent that everyone knew that the court was using the *McDonough* standard.

The defendants try to undermine this conclusion by arguing that the prosecution did not raise challenges for cause against all jurors with criminal convictions or family members with extensive criminal histories. To the extent that this is accurate, this argument would sway us only if the government did not challenge jurors with the same types of criminal histories as those who were struck for cause during deliberations. *Cf. Coulter v. McCann*, 484 F.3d 459 , 465 (7th Cir. 2007) (reiterating the established principle that when defense counsel claims that prosecutors have used a peremptory strike for an impermissible reason, it is necessary to show a "similarly situated venireperson" who was not struck). In this case, the defense has pointed to no comparable jurors who were not struck. No other juror had committed, as Ezell had, conduct with such significant similarities to the charged conduct at issue in the case.

Pavlick's dismissal during deliberations stemmed from an undisclosed felony DUI conviction during Ryan's tenure as Secretary of State. The Illinois Secretary of State sets many significant drunk driving policies, and this case dealt with locations of the Secretary's local motor vehicles administration facilities that might have connected Pavlick's conviction to Ryan's office. In fact, it appears that there was some action taken by the Secretary of State against Pavlick while Ryan was serving in that office.

The conviction, coupled with Pavlick's negative association with Ryan's office, provide ample grounds for dismissal for cause. Even Warner's counsel stated, "[w]e have a real concern with a convicted felon sitting with a deliberating jury for eight days." There was no argument from any attorney before the district court that Pavlick would not have been removed for cause had he been honest during voir dire. Also, the only juror with similar convictions to Pavlik's—alternate Masri—was also dismissed. Again, the district court was entitled to remove Pavlick under the *McDonough* standard.

Other jurors also found themselves under the court's scrutiny. Alternate juror Svymbersky failed to disclose a 23-year-old conviction charge for purchasing a stolen bicycle, explaining that he had not thought of it when filling out his questionnaire. The court ultimately believed this explanation. Juror Casino had three arrests (including one conviction) in the 1960s. He too testified that he did not remember these incidents when filling out the questionnaire. The district court remarked after interviewing Casino that "[t]his juror is as credible as any juror I have ever had." The court listened to the attorneys argue about Casino and then said, "somebody who really, truly doesn't remember it and hasn't gotten in any trouble since, it seems to me could hardly have a bias." Juror Rein was arrested in 1980 for assault for slapping his sister, but never appeared in court for the charge and thought that the matter had been expunged from his record. He testified that he did not recall the event when he filled out his questionnaire. By contrast, alternate juror Masri had reported a DUI conviction in 2000 but had not disclosed another DUI conviction in 2004 or that he was on probation in

September 2005. The district court ultimately allowed the defendants' cause challenge against Masri, and we have already noted the similarities between Pavlick's and Masri's criminal records. Although one of Masri's DUI misdemeanor convictions came out during voir dire, that one did not occur while Ryan was the Secretary of State and therefore it is not unreasonable that neither party would have moved to remove him for cause for that conviction alone. Only when it turned out that there were multiple, recent convictions, and that Masri was trying to hide them, did the likelihood that he would have been removed for cause become significant.

Looking at these other jurors (apart from Ezell and Pavlick), we view the district court's conclusion that only Masri could have faced a valid challenge for cause as reasonable. A district court has no obligation to grant a challenge every time it turns out that a venireperson has a criminal record. It has the discretion to determine, based on all the facts, whether dismissal for cause is necessary. *United States v. Ray*, 238 F.3d 828, 937 (7th Cir. 2001). We conclude that the district court applied the *McDonough* standard consistently in considering whether to excuse each of the jurors with undisclosed criminal histories.

C

Next we address the defendants' claim that the prosecution knew that Ezell was a defense holdout and that this was the real reason why Ezell was dismissed. The record does not support this contention. Three jurors were dismissed (Pavlick, Ezell, and Masri) after the investigations into their questionnaires. The district court concluded that "I

have genuine concerns that Mr. Pavlick and Ms. Ezell ... may very well have been motivated to get on the jury." Indeed, the strongest cases for challenges for cause were against these two jurors.

We cannot find any basis in the record to conclude that the district court dismissed Ezell because of her view of the evidence or that the prosecution tricked the district court into dismissing Ezell for cause based on its belief about Ezell's view of the evidence. The district court was troubled immediately after Ezell's criminal history was disclosed. We have no doubt that the district court's reasons (which we have already reviewed) for dismissing Ezell for cause were genuine.

Because of this, it does not matter what the prosecution may have suspected about Ezell's views on the evidence in this case. It is the court's actions that count when a decision is within the discretion of the court, not counsel's motivations for supporting or opposing the court's actions. So long as the court was not hoodwinked into believing there was cause where there was none (and it was not), the removal was proper. Without belaboring the point, we note finally that there is no serious basis in the record supporting the defense's speculation that the prosecution somehow knew that Ezell was a "defense" juror and that it was trying to bounce her from the jury for that reason. At best, everyone was guessing. These hunches fall far short of supporting the defendants' argument that the prosecution knew Ezell's view of the evidence, let alone sought her dismissal for that reason.

D

The defendants also contend that Ezell's removal "potentially chilled the expression of pro-defense jurors in deliberations." Based on our discussion above, we believe that the instructions that the court gave to the reconstituted jury prevented any chilling of pro-defense views in the new jury. It is also worth noting that the jurors who served on both juries would have recalled that when the court initially received the note about Ezell, it responded by instructing the jury that "you twelve are the jurors selected to decide this case." This instruction also operated to prevent any potential chilling of pro-defense views (or any other dissenting views). Moreover, the first juror dismissed after that response from the court was Pavlick, who had signed the note, not Ezell.

E

The defendants' last argument relating to the jury is that the background checks on jurors that the court ordered when word of the criminal backgrounds hit the media prejudiced the defense. The government rightly points out that the defense asked for many of these checks. Although this comes close to waiving this point for appeal, we are willing to assume that the defense's waiver was not complete. Nevertheless, the district court's specific instructions to the reconstituted jury, as well as its repeated admonitions to avoid media coverage of the trial, precluded any bias against the defense by preventing the jurors from knowing about the extent of the background checks. The defendants' only real support for their argument comes from Juror Losacco's testimony that she was "scared" during her interview.

But this trepidation appears to have resulted from the number of lawyers in the room during her interview rather than any feeling that she needed to serve the prosecution's interest or risk punishment. Therefore, we see no abuse of the court's discretion in its decision to call for the background checks.

In summary, the defendants' complaints about the court's handling of the jury are unsupported by the law and the record. The district court properly employed the *McDonough* standard in determining whether jurors should be removed, in determining whether an misstatement was made on the juror questionnaires and the reasons for the misstaement, and in focusing on whether the undisclosed information would have supported striking that juror for cause. With careful consideration and full attention to all counsels' arguments, the district court applied that standard consistently and openly to all of the jurors and alternates. The court did not dismiss Ezell because she was a "holdout," nor were jury deliberations chilled because of the way in which Ezell was removed. Finally, the record suggests no reason to think that the reconstituted jury was biased against the defendants because of the court's inquiries.

IV

The defendants next argue that the replacement of jurors after eight days of deliberations deprived them of their right to a fair trial before an impartial jury. One major strike against this argument is the fact that since its amendment in 1999, Fed. R. Crim. P. 24(c) has allowed for the removal of deliberating jurors. Although the defendants contend that the government has the burden of showing that a juror

replacement during deliberations is not prejudicial, this burden allocation is not supported by the text of Rule 24(c)(3), which states:

> *Retaining Alternate Jurors.* The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

So long as the two explicit conditions of the rule—ensuring that the alternate does not discuss the case prior to replacing an original juror and instructing the jury to restart deliberations—are satisfied, the decision to replace deliberating jurors rests firmly within the district court's discretion.

We have held that "[r]emoving [a] questioned juror and replacing her with an alternate" is reviewed for abuse of discretion. *United States v. Sandoval*, 241 F.3d 549, 552 (7th Cir. 2001). There is nothing in the text of Rule 24(c)(3) to suggest that a different approach is required for reviewing removals that occur during deliberations. The Fifth Circuit employed an abuse of discretion standard for juror removals during deliberations, although it is not clear whether the trial in that case took place before or after the Rule 24 amendment came into force; it concluded that a district court abuses its discretion in the context of juror removal only "if the juror was discharged without factual support or for a legally irrelevant reason." *United States v. Edwards*, 303

F.3d 606, 631 (5th Cir. 2002). (internal quotation marks and citations omitted).

The defendants urge us to rely on cases that predate Rule 24's amendment. They argue that we must reverse the conviction if "the record indicates a reasonable possibility of prejudice" from the removal of the juror during deliberations. *United States v. Register*, 182 F.3d 820, 843 (11th Cir. 1999). The flaw in this argument is that *Register* based its holding on "the letter of Rule 24(c)," which at that time stated that "[a]n alternate juror who does not replace a regular juror *shall be discharged* after the jury retires to consider its verdict." *Id.* (emphasis added). The court wrote that the rule "do[es] not apply a *per se* reversal standard to Rule 24(c) violations, [but rather] ... the harmless error test and reverse[s] ... only where there is a reasonable possibility that the district court's violation of Rule 24(c) actually prejudiced [the defendant] by affecting the jury's final verdict." *Id.* at 842. Thus, *Register* undertook a prejudice inquiry only because the district court had no discretion under the old Rule 24(c) to retain alternate jurors.

Under the amended Rule 24(c), the district court has discretion to retain alternates during deliberations. We think it most useful to look to our general approach to Rule 24 to decide whether the court properly removed Ezell and Pavlick. Only where a district court fails to comply with the non-discretionary requirements of Rule 24(c)(3) should our review require a prejudice inquiry like that in *Register*. Otherwise, "if the record shows some legitimate basis for th[e] decision [to replace a juror], there is no abuse of discretion." *United States v. Humphrey*, 34 F.3d 551, 557 (7th Cir. 1994). The

defendants have the burden of demonstrating on appeal that there was no legitimate basis in the record for the district court to remove Ezell and Pavlick and replace them with alternates.

The defendants claim that the jurors were incapable of following the court's instructions to begin anew, but we have already rejected that argument. They also point to the fact that the jury had sought and received guidance from the court during its original deliberations, and they charge that the jury "resorted to misconduct in an effort to force the removal of a holdout defense juror," about which we have little more to say. The defendants also refer to unsubstantiated reports in the media that the jury had already deliberated to verdict on several counts to demonstrate that there was no basis in the record for the district court to seat the two alternate jurors.

We have no intention of deciding this case based on anything but what is properly in the record. The only allegation that we need address is the one of jury misconduct, and it is easily rejected. The district court, based on its assessments of the jury's notes to the court, concluded that there was no concerted effort to remove any juror based on her viewpoint. This conclusion, which is supported by the record, provides all the basis this court needs to affirm the district court's decision to order substitutions of jurors.

The defendants complain that we have no way of knowing whether the jury really started its deliberations anew, as the court told it to do. They also charge that the record reveals a likelihood that empaneled alternate DiMartino discussed the case with outsiders while the first jury's deliberations

were ongoing. We have no quarrel with the Eleventh Circuit's practical observation that "the further along deliberations proceed, the more difficult it becomes to disregard them and begin anew." *United States v. Kopituk*, 690 F.2d 1289, 1310-11 (11th Cir. 1982). *Kopituk* also held, however, even before the amendment to Rule 24, that even though

> the jury spent a total of approximately five days deliberating prior to substitution of the alternate ..., the jurors' individual assurances that they could and would begin deliberating anew, combined with the fact that the jury deliberated for a full week subsequent to substitution of the alternate juror, is sufficient indication that the jurors were able to and did in fact obey the court's extensive instructions regarding their duty to eliminate all prior deliberations from their minds and begin with a clean slate.

Id.; see also *Edwards*, 303 F.3d at 631 (dismissing a juror after eleven days of deliberations, although not discussing seating an alternate); *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) (overturning verdict where reconstituted jury deliberated for only 29 minutes). In the case before us, the original jury deliberated for eight days and the reconstituted jury deliberated for ten. As in *Kopituk*, there is nothing here to suggest that the jurors did not obey the court's instructions and begin deliberations anew. Indeed, the reconstituted jury even requested additional instructions from the court on specific counts in the indictment during its deliberations that the original jury had not sought.

The record also gives no reason to be especially concerned about alternate DiMartino. She testified before being seated that every time someone would approach her about the case while the first jury was deliberating, she would cut them off immediately. When asked by the court if there was anything she had heard that could "interfere with your ability to become – to start fresh with the jury," she replied "No ... because, like I said, we never sat down and had a conversation and discussed anything, what they heard or anything.... I would just go, 'Please don't talk about it to me,' I said, 'I am still involved.'" As the district court made clear in its denial of defendants' motion for new trial, it found these statements to be credible. We have no reason to second-guess that factual determination.

Rule 24(c) therefore furnishes no basis for a finding that the district court abused its discretion in replacing jurors Ezell and Pavlick with alternate jurors DiMartino and Svymbersky. Defendants have made no showing that this replacement of jurors does not fall squarely within the allowable bounds of the new Rule 24. As they confess in their brief, they seek a holding that "almost any decision to substitute [during deliberations is] prejudicial." This cannot be the proper standard under the new Rule 24(c).

V

Moving, at last, away from the jury issues, the defendants claim that the district court erred in excluding evidence that showed Ryan's good faith, Ryan's lack of fraudulent intent and the reasonableness of Ryan's belief about the bona fides of the transactions at issue in this case, including those that involved Warner. We review a district

court's evidentiary decisions for abuse of discretion. *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005). Mail fraud is a specific intent crime, and so defendants are entitled to introduce evidence of good faith or absence of intent to defraud. *United States v. Longfellow*, 43 F.3d 318, 321 (7th Cir. 1994). This court, however, "do[es] not require that any evidence, no matter how tangential, irrelevant or otherwise inadmissible, must be admitted simply because the defendant claims that it establishes his good faith." *Id.* at 321-22.

A

The first evidentiary dispute arose when Ryan wanted to introduce evidence to the effect that his successor as Secretary of State, Jesse White, had renewed some of the leases and contracts at issue here. The district court excluded this evidence as irrelevant. It reasoned that "the naked act of some other official, whether he preceded or followed Ryan in office, does not shed any light on what Ryan himself intended when he took that same act, absent evidence that Ryan actually considered the official's act." It continued, "[t]he decision to renew a lease is, moreover, one influenced by many factors other than the decision to enter into a lease in the first place." The question for us is whether this decision was an abuse of the district court's discretion.

Many of the leases at issue here involved property for long term operations, such as DMV locations and a police department office. These are not the type of facilities that the state can pack up every few years and move just because rent is slightly cheaper a few blocks away. Thus, a later administrative decision to renew such a lease shows only that the lease is not so

disadvantageous to the state that it outweighs the costs that would be required to move to a new location. It sheds no light on whether the original lease or contract was proper.

In making its determination, the district court was not applying any sort of "inflexible rules." In *Riordan v. Kempiners*, one of the cases the defendants cite, the district court had drawn a line in time and prohibited all evidence that developed after a specific date. 831 F.2d 690, 698 (7th Cir. 1987); see also *CERAbio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 993 (7th Cir. 2005) (holding that evidentiary exclusions should be made based on the substantive value of the evidence rather than the date of the evidence). The district court's ruling here, in contrast, was based on the substance of the evidence that would be offered and the court's evaluation of the probative value of that evidence.

The limited nature of the district court's ruling becomes even more evident when one sees that it did not even apply to all evidence post-dating the leases and contracts. Both the prosecution and defense provided experts to assess the soundness of the contracts and leases at issue in this case. The government's expert offered only a retrospective analysis of the extent to which some of the subject leases reflected fair market value. The defense expert, in contrast, appears to have based his opinion in part on an analysis of leases and properties that were not available until years after the leases at issue were awarded.

Defendants therefore had the opportunity to justify the contracts and leases at issue using economic analysis and expert testimony; they were

not deprived of the opportunity to assess these deals with the benefit of hindsight. This means as well that the defense was not arbitrarily foreclosed from putting forth relevant evidence, the error criticized in *CERAbio*, 410 F.3d at 994.

The defendants' argument that prosecution witness Glen Good's testimony unfairly crossed some temporal line fails because there was no such line. The proper comparison, in any event, is not between Good's testimony and evidence that Secretary White renewed the leases. It is between Good's testimony and the defendants' evidence about lease decisions and the results of those decisions during Ryan's tenure as Secretary of State. Good, who was in charge of property maintenance during Ryan's term in office, testified about the soundness of particular lease decisions during Ryan's tenure. Good's testimony also rebutted the argument that Ryan made lease decisions only on the basis of recommendations from his staff. Ryan was free at trial to introduce evidence about his decisionmaking process for the leases and contracts in question, and he took advantage of that opportunity. The defense was also allowed to cross-examine Good extensively (over the government's objection) about the information he omitted from his reports about certain various properties at issue in this case.

It is conceivable that another court would have reached different conclusions about the relevance of this excluded evidence, but that does not mean that the district court abused its discretion here. We conclude that its ruling was one that it reasonably could have made, that it was not a result of arbitrary line-drawing, and thus that it did not give rise to reversible error.

B

The district court used a similar rationale to exclude evidence of rate increases made by other Illinois Secretaries of State. The defendants claim that the district court "refused to admit defense evidence showing that such rate increases were a regular practice of the SOS." This mischaracterizes the district court's holding. The specific rate increases by other officials were excluded where they played no role in Ryan's rate increase. The court allowed Ryan to introduce evidence that his predecessor (and his predecessor's advisors) recommended a rate increase as overdue, but held off on the increase for election reasons. This type of evidence is arguably probative because it provides support to Ryan's contention that the increase was a sound policy decision. See *Longfellow*, 43 F.3d at 322.

The defendants claim that the rate hikes approved by other Secretaries of State were "evidence of the routine practice of [an] organization[]" and should have been allowed as evidence under Fed. R. Evid. 406. A "routine practice," however, requires more repetition and mechanization than the occasional rate decisions here displayed. See Advisory Committee Notes for Rule 406, emphasizing the need for a "repeated specific situation" before something qualifies as "habit." The Note comments that "[e]quivalent behavior on the part of a group is designated 'routine practice of an organization' in the rule." The practice that the defense wanted to demonstrate here was not the type of "regular response to a repeated specific situation" required for admission under Rule 406. Here again, we conclude that the district court did not abuse its discretion by excluding the proffered evidence.

C

Finally, the defendants challenge the exclusion of certain policy decisions that Ryan made while in office. The defense argues that "the prosecution attacked Ryan at trial as [a] 'greedy,' 'shameless' politician who treated his public offices as 'personal kingdoms' in which he was 'pillaging the state, stealing from the taxpayers' in breach of the public's trust." Ryan, they argue, was entitled to an opportunity to correct this impression. If these quotes had come from the government's case-in-chief, then they might have a point. But they did not. The quoted statements come from the prosecution's closing argument. The government did not use evidence of Ryan's general dishonesty in its case-in-chief; it focused on the bad faith associated with the criminal acts charged in this case. The district court permitted Ryan to introduce evidence of many of his policy accomplishments and goals. It also allowed him to call numerous character witnesses, who testified about such achievements as strengthened drunk-driving laws, improvements in the state library system, the development of an organ-donor registry, and reform of Illinois's death-penalty laws. The government's closing argument was therefore an allowable response.

The defendants also point to a particular government witness, Patrick Quinn, whom the defense sought to impeach through his opposition to Ryan's death penalty work. The district court was prepared to allow the defense to impeach Quinn, but it was willing to permit reference only to a "public policy" disagreement, not to the death penalty. Ryan chose not to impeach the witness. The defendants

have not shown how they were prejudiced by this limitation.

In a more general argument, the defendants contend that had the jury been able to view the charged acts alongside the excluded evidence of Ryan's policy work, it would have seen that the evidence overall "did not fairly indicate the existence of a scheme to defraud." *Worthington v. United States*, 64 F.2d 936, 942 (7th Cir. 1933). The link between the excluded evidence and the charged acts, however, is not so direct.

Had it existed, evidence that Ryan steered leases or contracts away from his financial benefactors might have cast some doubt on the existence of the conspiracy and scheme charged. But Ryan's work on issues of importance to the public, such as the death penalty, important and admirable though it may have been in many people's eyes, does nothing to show that Ryan was not at the same time accepting financial benefits in exchange for other specific, official actions. So long as the government did not allege specifically that *all* of Ryan's acts as Governor were for his own financial gain, the district court was within its rights to exclude discussion of various official acts that were wholly disconnected from the charges in this case. Courts have held that excluding evidence of satisfied customers is not an abuse of discretion in cases charging a defendant with a fraudulent scheme. See, *e.g.*, *United States v. Elliott*, 62 F.3d 1304, 1308 (11th Cir. 1995). Excluding evidence of activities even further removed from the charged acts is not an abuse of discretion either.

VI

In the next part of their appeal, the defendants raise a question of law: is it permissible for the government to charge and prove the State of Illinois itself is an "enterprise" for RICO purposes, and secondarily, did the district court err when it instructed the jury that the State of Illinois is a "legal entity." We consider these arguments in turn.

A

The question whether a state may be an "enterprise" for purposes of a RICO prosecution is one of first impression. The defendants' first reason for arguing that it cannot be relies on the remedies allowed under RICO. The statute provides for remedies including court-ordered "dissolution or reorganization of any enterprise," 18 U.S.C. § 1964(a). Since it is obvious that no court would have the power to disband a sovereign state, the defendants argue that the remedial provisions of the law implicitly mean that the state cannot be a RICO enterprise.

The only problem with this attack is that the Supreme Court rejected it long ago:

> Even if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept. Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions.

United States v. Turkette, 452 U.S. 576, 585 (1981). RICO provides a menu of remedies; it does not matter

if one or more of the items on that menu might be unavailable in a particular case. Instead, what is important, according to *Turkette*, is that Congress meant the term "enterprise" to be "inclusive." 452 U.S. at 586.

This court has held that other public bodies, which similarly cannot be dissolved, may be the "enterprise" through which a RICO conspiracy or operation proceeds. See, *e.g.*, *United States v. Murphy*, 768 F.2d 1518, 1531 (7th Cir. 1985) (the Circuit Court of Cook County); *United States v. Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1318-19 & n.9 (7th Cir. 1981) (en banc) (RICO enterprise can be a public body, citing cases). We conclude that for purposes of defining a RICO "enterprise" there is no difference between the state and its subdivisions.

The defendants next argue that comity interests prevent the use of a state as a RICO enterprise in a criminal case. The only court to consider directly whether a state can be a RICO enterprise was the District Court of Maryland. *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976). The defendants urge us to accept the reasoning in *Mandel*, which found that the State of Maryland was not a RICO enterprise in the prosecution of a Maryland governor. 415 F. Supp. at 1021. District court opinions have no authoritative effect on this court, so we look to the analysis of district courts only to inform, rather than instruct, our decisions. *RLJCS Enters. v. Prof'l Benefit Trust Multiple Employer Welfare Benefit Plan & Trust*, 487 F.3d 494, 499 (7th Cir. 2007).

It is enough to note that Mandel did not limit its analysis to states as potential RICO enterprises. The district court there expressed concern about the

possibility of finding that *any* public entity was a RICO enterprise. 415 F. Supp. at 1020. Since *Mandel* was decided, the Fourth Circuit has criticized its analysis on several occasions. *United States v. Long*, 651 F.2d 239, 241 (4th Cir. 1981); *United States v. Altomare*, 625 F.2d 5, 7 (4th Cir. 1980); *United States v. Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980). In each of these cases, the Fourth Circuit explicitly rejected the rationale of *Mandel*. *Long*, for example, referred to *Altomare* and *Baker*, noting that "[i]n two recent RICO cases ... we have indicated our disapproval of that [*Mandel*] decision. We have held, in accord with the majority of the cases, that RICO should be construed to include public entities as enterprises." 651 F.2d at 241.

Long justified the use of major governmental entities as RICO enterprises in indictments, stating that "[n]either the Act nor the courts' interpretation of it support the contention that its enforcement threatens the discretion state officials must exercise in the discharge of their duties[, but instead] ... [t]he Act sustains, rather than threatens, the integrity of the South Carolina Senate," which was the named RICO enterprise in that case. 651 F.2d at 241. Our sister circuits have reached similar conclusions about the use of governmental entities as RICO enterprises. See, *e.g.*, *United States v. Angelilli*, 660 F.2d 23, 33 (2d Cir. 1981) ("[W]e view the language of § 1961(4), defining enterprise, as unambiguously encompassing governmental units, and we consider that the purpose and history of the Act and the substance of RICO's provisions demonstrate a clear congressional intent that RICO be interpreted to apply to activities that corrupt public governmental entities."); *United States v. Frumento*, 563 F.2d 1083, 1091 (3d Cir.

1977) (comparing the Commonwealth of Pennsylvania to a major corporation and concluding that if the RICO enterprise concept does not reach governmental entities, then "private business organizations legitimately owned and operated by the states ... would be open game for racketeers"); *United States v. Freeman*, 6 F.3d 586, 597 (9th Cir. 1993) ("We adopt the view of seven circuit courts and hold that a governmental entity may constitute an 'enterprise' within the meaning of RICO.'").

The decision that came closest to addressing the issue at hand is the Sixth Circuit's *en banc* opinion in *United States v. Thompson*, 685 F.2d 993 (6th Cir. 1982). There the court held that "The Office of the Governor" could be the enterprise in a RICO prosecution. *Id.* at 998-1000. The court supported its conclusion as follows:

> It seems clear to us that those who played the leading roles in the enactment of the RICO statute thoroughly understood organized crime's impact upon government entities. Senator McClellan, the chief sponsor of this bill and chairman of the committee which drafted it, said: "To exist and to increase its profits, Mr. President, organized crime has found it necessary to corrupt the institutions of our democratic processes, something no society can tolerate." Further, he said, "For with the necessary expansion of governmental regulation of private and business activity, its power to corrupt has given organized crime greater control over matters affecting the everyday life of each citizen."
>
> ...

> Representative St. Germain told the House that "the greatest danger from organized crime lies not in its provision of illegal goods and services, but in its penetration of the country's legitimate institutions."

Id. at 1000 (internal citations omitted).

The Sixth Circuit noted its concern that an indictment naming the governor's office as a RICO enterprise could be unnecessary and disruptive in some cases, and it recommended that prosecutors should try to avoid such charges in the future if possible. The court suggested that a modified indictment might work better in similar, future cases, based on the RICO definition of "enterprise" as "includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* (quoting 18 U.S.C. § 1961(4)). The court stated that "the language which could and we believe preferably should have been employed, would have alleged that the three defendants constituted a 'group of individuals associated in fact although not a legal entity which made use of the Office of Governor of the State of Tennessee' for the particular racketeering activities alleged in the indictment." Thompson, 685 F.2d at 1000.

We endorse the Sixth Circuit's call for caution. We also agree with the Sixth Circuit's ultimate conclusion that the prosecution's approach to this issue in cases such as *Thompson* and the case at hand may often not be absolutely necessary under RICO, but it is not forbidden. Some cases, however, are exceptional, and ours is one of them. In such a case, the prosecution may have no real alternative to

naming the state as the RICO enterprise. (This of course does not mean that the state itself has violated any federal law; it may instead be a victim of the overall scheme, as are many RICO enterprises.) In such a case, the use of the state as the RICO enterprise in the indictment is analogous to the courts' treatment of the state as a market participant in a dormant commerce clause case. If the CEO of a major corporation, who ascended to that position from other senior executive positions, engaged in comparable activities, we would not only accept but expect a RICO conspiracy indictment with the corporation itself named as the RICO enterprise, even knowing that the overwhelming majority of employees, shareholders, and consumers of the corporation were innocent of wrongdoing. The situation here is the same.

In this case, the prosecution thought that it had identified an ongoing scheme to defraud the State of Illinois through the illegal use of two of the most significant executive branch offices of the state and of the state's electoral processes during Ryan's campaign for Governor in 1998. The scheme revolved around an elected official throughout his tenure in these two offices – Secretary of State and Governor – and during the time he was a candidate for the latter office. No legal rule prohibited the prosecution from concluding that there was no single entity or office that it could have identified, short of the state as a whole, that would have encompassed the enterprise that was used by the defendants. In these unusual circumstances, comity interests do not override the broad language of RICO, as interpreted in *Turkette*. The district court did not err by allowing the state to

be the RICO enterprise in this RICO conspiracy prosecution.

B

We now turn to the district court's instructions to the jury on the question of the state as a RICO enterprise. All the district court said was that the State of Illinois is a "legal entity." Whether that is correct or not is a question of law, and as such, it was not one that could have been left for the jury to decide. See *United States v. Lee*, 439 F.3d 381, 388 (7th Cir. 2006) (upholding the district court's inclusion of a definition of "organization" in its instructions where the statute required that "the Government must prove ... that the defendant uttered or possessed a counterfeit and forged security of an organization"). The district court told the jury that the government had to prove three things, including that the State of Illinois was an enterprise. Some "persons" (legal or real) may be "entities" but they still may not meet the statutory definition of "enterprise." See, *e.g.*, *Turkette*, 452 U.S. at 582 (examining the characteristics of a criminal structure to determine whether it was an "enterprise" under RICO). Nevertheless, because governmental or public entities fit within the definition of "enterprise" for purposes of RICO, this court has often rejected objections to jury instructions that a governmental entity is an "enterprise." See *United States v. Hocking*, 860 F.2d 769, 778 (7th Cir. 1988) ("In light of our clear precedent, appellant's claim that the district court erred in instructing the jury that the IDOT is an 'enterprise' within the reach of § 1962(c) is rejected."); see also James Morrison Mecone, *et. al.*, *Racketeer Influenced and Corrupt Organizations*, 43 Am. Crim. L. Rev. 869, 881 (2006) ("When the

enterprise under consideration is a legal entity, the enterprise element is satisfied by the mere proof that the entity does in fact have a legal existence."). We conclude, therefore, that the district court did not err when it accurately informed the jury that the State of Illinois is a legal entity.

VII

The next argument that Warner and Ryan present is that the term "intangible right to honest services" in the mail fraud statutes under which they were convicted, 18 U.S.C. §§ 1341 (basic mail fraud), 1346 (definition of "scheme or artifice to defraud" includes deprivation of intangible right to honest services), is unconstitutionally vague. The district court's instructions to the jury, they continue, "mirrored" this vagueness.

The constitutionality of a statute is an issue of law that is reviewed *de novo*. *United States v. Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003). The defendants acknowledge that this court recently upheld the constitutionality of the "intangible right to honest services" term in the federal mail fraud statute. *Hausmann*, 345 F.3d at 958. The constitutionality of § 1346 has repeatedly been challenged, and every circuit to address this issue has upheld it, even though the rationales have differed. See, *e.g.*, *United States v. Rybicki*, 354 F.3d 124, 132 (2d Cir. 2003) (*en banc*); *United States v. Bryan*, 58 F.3d 933, 941 (4th Cir. 1995); *United States v. Gray*, 96 F.3d 769, 776-77 (5th Cir. 1996); *United States v. Brumley*, 116 F.3d 728, (5th Cir. 1997) (*en banc*); *United States v. Frost*, 125 F.3d 346, 370-71 (6th Cir. 1997); *United States v. Frega*, 179 F.3d 793, 803 (9th Cir. 1999); *United States v. Welch*, 327 F.3d 1081, 1109 n29 (10th Cir.

2003); *United States v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995). There have been dissenting opinions in two circuits' opinions on this issue. *Rybicki*, 354 F.3d at 162-64 (Jacobs, J. dissenting); *United States v. Brumley*, 116 F.3d 728, 742-47 (5th Cir. 1997) (Jolly, J. and DeMoss, J. dissenting).

Given this unanimity on the central point, our concern here is only with the question whether the district court's instructions properly reflected this court's approach to the details of the claim. Previous holdings on this issue are not necessarily dispositive because "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Powell*, 423 U.S. 87, 92 (1975). "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Posters 'N' Things, LTD. v. United States*, 511 U.S. 513, 525 (1994). If the defendants could not have known that the conduct underlying their convictions could be considered "depriv[ing] another of the intangible right of honest services," 18 U.S.C. § 1346, then the statute is void for vagueness as applied here.

In *Hausmann*, we held that

> under the intangible-rights-theory of federal mail or wire fraud liability, a valid indictment need only allege, and a finder of fact need only believe, that a defendant used the interstate mails or wire communications system in furtherance of a scheme to misuse his fiduciary

> relationship for gain at the expense of the party to whom the fiduciary duty was owed.

345 F.3d at 956. In *United States v. Bloom*, we similarly concluded that "[m]isuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty ... from federal crime." 149 F.3d 649, 655 (7th Cir. 1998). The opinion continued, "[a]n employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain." *Id.* at 656-57.

In the present case, we are facing the same type of conduct that was before the court in *Hausmann* and *Bloom*. The defendants claim that the jury instructions in this case contradicted the holdings in those two cases, but we disagree. Those cases do not require the jury to find a violation of a specific state law in order to convict. The court told the jury that "the government [must] prove[] beyond a reasonable doubt that the public official accepted the personal financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return." The court continued that the receipt of "personal or financial benefits ... does not, standing alone, violate the mail fraud statute.... Instead that receipt violates the law only if the benefit was received with the public official's understanding that it was given to influence his decision-making." The court also told the jury that "[n]ot every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation."

The portion of the jury instructions quoted by the defendants about "conflict of interest" is taken out of

context, as the jury instructions explicitly stated that a conflict of interest violated the statute only "if the other elements of the mail fraud statute are met." The district court explained that the government must also show that the public official allowed or accepted the conflict of interest with the understanding or intent that she would perform acts within her official capacity in return.

We are unpersuaded that the references to state law in the jury instructions were phrased in a way that makes the use of the mail fraud statute here unconstitutional. Many of the state law provisions in the instructions explained what kinds of financial transactions are not prohibited for state officials. This explanation was more likely to undermine than to assist the prosecution in showing the defendants' intent to deprive Illinois citizens of Ryan's honest services. The other cited provisions of Illinois law identified for the jury various ways in which a public official could "misuse his fiduciary relationship," but the instructions as a whole unambiguously required the prosecution to prove that misuse of the office was intended for personal gain, as *Bloom* and *Hausman* held.

We also note that this court in *Bloom* did not call the relevant section of the mail fraud statute a "common-law federal crime[]," as defendants suggest. It merely analogized this section to common law crimes on the way to concluding that the "intangible right" term needs clear boundaries. 149 F.3d at 656. A court's interpretation of a term in a federal criminal statute does not create a federal common law crime.

Although the intangible rights theory of federal mail fraud may have its problems when applied to other fact settings, it is not unconstitutionally vague as applied here. The district court here focused the jury on the important points needed for conviction, and in so doing, gave instructions consistent with *Hausmann* and *Bloom*.

VIII

We turn, now, to Warner's assertion that the court erred by permitting the joinder of his trial with Ryan's and denying his motion for severance. This court has construed Fed. R. Crim. P. 8, which governs joinder in criminal trials, "broadly to allow liberal joinder in order to enhance judicial efficiency." *United States v. Stillo*, 57 F.3d 553, 556 (7th Cir. 1995). We have repeatedly stated that "joint trials are beneficial not only for efficiency but because they limit inconvenience to witnesses, avoid delays in bringing defendants to trial, and allow the 'total story' to be presented to a single jury." *Id.* at 557. We review misjoinder claims *de novo*. *United States v. Lanas*, 324 F.3d 894, 899 (7th Cir. 2003).

A

Joinder is proper, under Rule 8(b), if the defendants "are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Under the rule, "[t]he defendants may be charged in one or more counts together or separately"; all defendants "need not be charged in each count." Rule 8(b) is satisfied when the defendants are "charged with crimes that well up out of the same series of such acts, but they need not be the same crimes." *United States v. Pigee*, 197 F.3d 879, 891 (7th Cir.

1999). See also *United States v. Stewart*, 433 F.3d 273, 314 (2d Cir. 2006); *United States v. Eufrasio*, 935 F.2d 553, 567 (3d Cir. 1991). "[T]he mere fact that two conspiracies have overlapping memberships will not authorize a single indictment if the conspiracies cannot be tied together into one conspiracy, one common plan or scheme," but a "conspiracy and its cover-up are parts of a common plan." *United States v. Velasquez*, 772 F.2d 1348, 1353-54 (7th Cir. 1985).

Whether there was an error in joining a defendant is determined by looking only at the indictment. *Lanas*, 324 F.3d at 899. In this case, the final indictment contained 22 counts. Count One was the RICO conspiracy for which both Warner and Ryan were charged. Count Two was the mail fraud scheme, which is listed in Count One as a racketeering act and a means and method of the RICO conspiracy; again, it charged both Warner and Ryan. Of the remaining twenty counts, both were charged in six (Counts Three, Four, Five, Seven, Eight, and Nine), Ryan alone was charged in ten (Count Six, Counts Ten through Thirteen, and Counts Eighteen through Twenty-two), and Warner alone was charged in four (Counts Fourteen through Seventeen). (The defendants were acquitted on Counts Nine and Ten.)

Examining the indictment, we see that both defendants were charged in the RICO conspiracy and the mail fraud scheme, the two primary courses of conduct charged in the indictment. The mail fraud scheme was also part of the RICO conspiracy. In *Velazquez*, the court found misjoinder of one count because "[t]he indictment does not relate those charges to any of the charges against the other defendants named in the indictment, and the defect is not merely a technical oversight in pleading."

Velasquez, 772 F.2d at 1353. By contrast, in this case, all of the conduct in Counts One through Seventeen relates to the charges in either the RICO conspiracy, mail fraud scheme or both, which are charged against both Warner and Ryan.

The only charges unconnected to these two schemes appear in Counts Eighteen to Twenty-Two, Ryan's tax fraud charges. This court has held that "[j]oinder of a tax evasion count is appropriate when it is based upon unreported income flowing directly from the activities which are the subject of the other counts." *United States v. Anderson*, 809 F.2d 1281, 1288 (7th Cir. 1987). The tax fraud scheme charged in Count Eighteen was specifically related to Ryan's campaign committee "Citizens For Ryan." The factual allegations in Count Eighteen recount Citizens For Ryan's diversion of funds to pay for Ryan's and his family's personal expenses, "thereby depriving the IRS of accurate information as to his true income." The allegations of Count One, the RICO conspiracy charge, state that Ryan was obligated by law to report on his federal and state tax returns all expenditures by Citizens For Ryan that were made for personal expenses. Count One also states that part of the *modus operandi* of the RICO conspiracy was the provision of "personal and financial benefits to, and for the benefit of, defendant Ryan, Ryan family members, third parties affiliated with Ryan, and Citizens For Ryan ... for the purpose of influencing and rewarding Ryan in the exercise of Ryan's official authority." From the language of the indictment, we can see that the tax fraud scheme and the RICO conspiracy scheme are part of "the same series of acts or transactions, constituting an offense or offenses." Fed. R. Crim. P. 8(b). Many of the same

underlying facts—the movement of funds through Citizens For Ryan, for example—are necessary to prove both claims. All of this is enough to explain why we find no improper joinder of the charges against Warner with those against Ryan.

B

Because joinder was proper under Rule 8(b), Warner must show that he has suffered from "prejudicial joinder," which is distinct from misjoinder. "If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). In order to prevail on his argument that the district court erred in denying his motion for severance under Fed. R. Crim. P. 14(a), it is necessary (though not sufficient) for Warner to show prejudice. *Zafiro v. United States*, 506 U.S. 534, 538-39 (1993). See also *United States v. Souffront*, 338 F.3d 809, 831 (7th Cir. 2003) (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)). "Limiting instructions ... often will suffice to cure any risk of prejudice," and tailoring relief from prejudice is left to the district court's discretion. *Zafiro*, 506 U.S. at 539-541. Where joinder of defendants was proper, "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. "Actual prejudice" does not exist just because "separate trials would have given a defendant a better opportunity for an acquittal."

Rather, the defendant must have been "deprived of his right to a fair trial." *United States v. Rollins*, 301 F.3d 511, 518 (7th Cir. 2002). The denial of a motion for severance is reviewed for abuse of discretion. *Id.*

Warner argues he suffered prejudice because the joinder violated his substantial rights in multiple ways. He objects first to the fact that his case was linked at all with Ryan's, but this argument goes nowhere, as the indictment demonstrates that the charges against him were closely connected with those against Ryan. Had he been tried separately, he would not have enjoyed the status of "an unknown businessman," as he suggests; he would have still faced charges as a co-conspirator that centered around the activities of the former Governor. Therefore, Warner cannot show that the publicity around Ryan's trial affected his substantial rights in this case.

Next, Warner alleges that Ryan's out-of-court statements to the FBI were testimonial and therefore his constitutional right to confrontation was violated. These statements were not admitted for the truth of the matter asserted, however, and therefore are not hearsay and do not implicate the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004). There was also no *Bruton* issue, because the statements admitted at trial were not inculpatory and did not amount to a confession from Ryan. *Bruton v. United States*, 391 U.S. 123, 127 (1968). The district court excluded the statements that it viewed as potentially inculpatory, including all of Ryan's statements to the FBI naming Warner except those with innocuous or uncontested references.

Warner also contends that significant portions of the evidence introduced against Ryan could not have been introduced against him in his own trial. The record does not bear this out. Much of the evidence with which Warner takes issue described acts that were part of the conspiracy charged against both defendants in Count One or the scheme charged against both defendants in Count Two. "[E]vidence of one participant's actions in furtherance of a scheme to defraud is admissible against the other participants in that scheme, just as it is in a conspiracy case." *United States v. Adeniji*, 221 F.3d 1020, 1027 (7th Cir. 2000).

The only significant evidence that was unrelated to the charges against Warner was some evidence pertaining to Ryan's tax fraud scheme. Yet even these acts derived from a common set of facts that made up the RICO conspiracy and mail fraud scheme. Therefore, much of the evidence of "a decade of state business, as well [as] ... Ryan's lifestyle and personal and political campaign finances," was properly part of the evidence that was admissible against Warner because of Counts One and Two. For these reasons, the district court's denial of Warner's proposed limiting instruction for the tax counts was appropriate. The tax evidence relating only to Ryan was minor compared to the evidence presented to show the conspiracy and mail fraud scheme. The district court did not abuse its discretion in curing any possible prejudice from joinder through limiting instructions rather than severance. See *Zafiro*, 506 U.S. at 539.

Finally, Warner argues that the jurors were not following the court's instructions generally and therefore the limiting instructions were ineffective.

We are reluctant to call into question the institution of the jury in this way. As we said in *United States v. Hedman*, we may examine "whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant" in considering whether severance was improperly denied. 630 F.2d 1184, 1200 (7th Cir. 1980) (internal quotation marks omitted). Nothing in this record convinces us that this jury was either unable or unwilling to follow the careful instructions that the district court gave. Warner does not claim that there was insufficient evidence to convict him on any of the charges against him (although we note the district court threw out to Ryan's convictions on two counts for insufficiency of the evidence).

We conclude that Warner has not shown actual prejudice resulting from the joinder of his case with Ryan's. To the extent that there was a risk of prejudice, the district court took appropriate steps to exclude evidence, restrict the use of evidence, and provide specific limiting instructions to the jury. It did not abuse its discretion under Rule 14(a) by denying Warner's motion for severance.

IX

Finally, Ryan alone also asks this court to hold that it was error to compel the former chief legal counsel in the Secretary of State's office to provide grand jury testimony about his work with then-Secretary of State Ryan. This compelled testimony, Ryan argues, violated his attorney-client privilege. We decline to consider this issue for two reasons. First, Ryan has failed to demonstrate what legally cognizable prejudice he suffered from that decision. It

is also not clear what relief he is seeking for this alleged infringement of the privilege. Generally, a defendant challenging an indictment seeks to have the indictment dismissed, but the relief Ryan seeks in this appeal is a new trial. This would do nothing to correct an error in the indictment. The Supreme Court has held that a

> petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt ... [and therefore] any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

United States v. Mechanik, 475 U.S. 66, 69 (1986). Ryan suggests no reason why this general rule should not apply here. Even in cases where indictments can be dismissed, a court "may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988).

Ryan states in his brief that he "re-raise[s] the issue here to preserve it for further review." While parties are free to make a limited argument in order to preserve the issue for further review, they must say something to allow this court to consider the argument on its merits, even if they have every expectation that we will reject it. Ryan has not developed this point enough for us to give it meaningful consideration; we thus consider it waived. See *United States v. Jones*, 224 F.3d 621, 626 (7th Cir. 2000).

Second, this court has already spoken on this point. Ryan was entitled to and did appeal the district court's determination in 2001 that the attorney-client privilege did not attach to his communications with the chief legal counsel in the Secretary of State's office. *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002). We considered and rejected this argument at that time. *Id.* at 295. That is the law of the case, and Ryan has given us no reason to deviate from it. See *In re Oil Spill by The Amoco Cadiz*, 954 F.2d 1279, 1291 (7th Cir. 1992). We acknowledge that the Second Circuit, in a different case involving communications between a governor and his counsel, has concluded that the privilege applies. See *In re Grand Jury Investigation*, 399 F.3d 527, 535 (2d Cir. 2005). The Second Circuit acknowledged the tension between its holding and the decisions of three other circuits, including our court's 2002 decision. 399 F.3d at 533 (noting contrary decisions from the Seventh, Eighth, and D.C. Circuits); see generally *In re Lindsey*, 332 U.S. App. D.C. 357, 158 F.3d 1263 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997). As matters now stand, three other circuits have weighed in on this issue, two of which agree with us. Even apart from law-of-the-case considerations, we respectfully decline to re-open that issue here.

X

We conclude with two final comments about this appeal. First, like all defendants who appeal their convictions, Ryan and Warner have presented certain arguments to this court and they have elected not to present other arguments. At oral argument, there was some discussion of the argument that our

dissenting colleague has emphasized – an argument that they chose not to raise: the allegation that members of the jury may have had too much freedom of movement and too much unsupervised time together, during which the opportunity to engage in premature discussions of the case may have arisen. Compare *United States v. Dellinger*, 472 F.2d 340, 373-74 & n.50 (7th Cir. 1972) (emphasizing need for thorough voir dire in presence of extensive pretrial publicity). Jury control measures, however, lie within the discretion of the district court judge; this is not an area in which a decision not to sequester, or a decision to permit jurors to walk around unsupervised, triggers such a strong presumption of error that we would have to reverse on that basis even in the absence of *both* (1) any objection at trial and (2) any complaint on appeal. See *Recuenco, supra*. District courts have no duty to "sequester the jury..., *sua sponte*, in every case involving prejudicial publicity." *Margoles v. United States*, 407 F.2d 727, 732 (7th Cir. 1969). There is no presumption or rule that sequestration is ever necessary, although we do not dispute that it is a good idea in some high-profile cases, and may well have been the better course here. See *United States v. Carter*, 602 F.2d 799, 808 (7th Cir. 1979) (Tone, J. concurring) (noting this and suggesting such a rule may be preferable). Our opinion, then, should not be taken as necessarily approving of the practices the district court adopted for this case; on the other hand, without the proper objections and briefing, it would be improper for us even to reach the question of plain error arising from the lack of sequestration or tighter controls on the jury's activities. Managing a jury for a trial that spans six months is not easy. We can only emphasize that if any party has an objection to the way the

district court is handling that challenge, it has an obligation to raise it, preferably early enough in the proceedings that the court can take prompt corrective measures. If Warner and Ryan believe that their counsel rendered constitutionally ineffective assistance by opting not to raise certain issues on appeal, they may raise that argument in post-conviction relief proceedings.

Our colleague in dissent believes that "there is a structural error because the jurors' irreconcilable conflicts of interest that resulted from the jury questionnaire situation," specifically the investigation of jurors during deliberations. Respectfully, we cannot agree that this provides a sound basis for reversal. First, many of the investigations were done at the request of the defense; defendants cannot embed a ground of automatic reversal into a case in this way. Second, neither the law nor the course of proceedings in the district court support such a characterization.

Even if the facts about the investigations and any possible juror reactions and anxieties were clear, we do not read the Supreme Court's decisions as including these kinds of errors in the narrow "structural error" category. In *Remmer, supra*, the Supreme Court addressed the issue of possible juror bias after the court called in an FBI agent to question a juror about the incident without consulting with defense counsel. The Court remanded the case for a determination of whether "such contact with the juror was harmless to the defendant." 347 U.S. at 229. That is not the language of structural error; prejudice (or harm) is presumed and irrebuttable in structural error cases. Once we are in "harmless error" territory, the nature of the error, the strength of the

government's case, and the actions the court took in response to problems are all relevant. We have already explained why we have found the errors that were properly called to our attention to be harmless, to the extent that error existed. The Supreme Court has repeatedly affirmed *Remmer* and held that "[d]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). As our own court has noted, "[we] afford deference to the trial court as the lower court has the primary responsibility to evaluate possible influences on the jury... [and a] decision to deny a motion for mistrial based on juror bias therefore is reviewed according to an abuse of discretion standard." *McClinton*, 135 F.3d at 1186 (Kanne, J.). Therefore, even if the defendants had argued that the problems with the jury that the dissent has described amounted to structural error, we would reject that characterization in favor of a harmless-error analysis.

More importantly, however, there is the problem we have already noted of finding structural error in the absence of any such argument asking for such a finding on appeal. Even when the Supreme Court's decisions call for structural error analysis, the factual basis for finding such error may be in dispute, as it is here. See, *e.g.*, *Bracy v. Schomig*, 286 F.3d 406, 409-11 (7th Cir. 2002) (*en banc*) (discussing type of proof necessary to prove trial judge's bias and, thus, structural error). *Remmer* tells us that an interrogation of a sitting juror by law enforcement is not structural error. Therefore the investigation of sitting jurors is not always structural error, even though there may be a risk, as the dissent points out, that the investigation is psychologically disturbing to

the jurors. Just as in *Bracy*, we would need to determine what facts were necessary to conclude that this type of juror investigation constituted structural error. Yet the defendants raise the juror investigation issue only as support for their argument that the removal of Ezell was improper. Unlike the dissent, we are unwilling to transform this modest point into an argument that the essential right to an impartial jury was violated. To repeat our earlier conclusion, the district court took every possible step to ensure that the jury was and remained impartial, and, through credibility findings and findings of fact, concluded that this one was.

Second, throughout their briefs, the defendants note that the district court judge described some of her rulings as "difficult" or "close calls." The impression they give is that this is some kind of signal that the court knew it was wrong. We draw no such inference. A district court's acknowledgment of the difficulty of an issue, if anything, is a sign that the court has given it full consideration. When all was said and done, the court made the necessary determinations of law, which we have reviewed *de novo*, and exercised its discretion, which we have reviewed deferentially. Counsel have argued in great detail every point that they chose to bring before us, and we have limited our review of the trial proceedings to those issues. The high-profile nature of these proceedings gave rise to some unusual problems with the jury, but we are satisfied that the court handled them acceptably. For all of the reasons discussed above, the district court properly denied the defendants' new trial motion. We Affirm the judgments of the district court convicting both Warner and Ryan.

KANNE, *Circuit Judge*, dissenting.

My colleagues in the majority concede that the trial of this case may not have been "picture-perfect," – a whopping understatement by any measure. The majority then observes that the lack of a picture-perfect trial "is, in itself, nothing unusual." I agree that from my experience this is a realistic proposition. There is rarely perfection in any human endeavor – and in particular jury trials. What we expect from our judicial system is not an error free trial, but a trial process that is properly handled to achieve a fair and just result. That fair and just result was not achieved in this case.

The basis for my dissent lies not in the exceedingly drawn out evidentiary phase of this trial but in the dysfunctional jury deliberations. As to this point, the majority has taken great pains – in twenty-nine pages – to declare the flood of errors regarding the jury deliberations to be merely harmless. To understand the influences that came into play for the jurors in this case, I believe it is necessary to place various factors in overall perspective. Some of the factors would be unremarkable in a routine criminal case and other factors are totally astounding in any case. The following are highlights in summary fashion:

- In a case that was tried over a six month period, the jurors entered and exited the courthouse every day past scores of television and still cameras and reporters.
- The jurors used public elevators and brushed elbows with anyone who happened to be in them.

- Although the court's intent was not to make the jurors' names public, that effort was compromised when the jurors' names were used in the in-court voir dire.
- When jury deliberations were ready to commence in the most high profile case in Chicago in recent memory, there was no thought of sequestering the jury.
- During the initial eight days of deliberations an apparent holdout juror was purportedly threatened by other jurors with a charge of bribery.
- Legal research gained by a juror from the internet was – contrary to the court's instruction – brought into the jury room in an effort to persuade the recalcitrant juror to change her position.
- A reporter for the *Chicago Tribune* advised the district court during jury deliberations that the newspaper's research had disclosed major inconsistencies between answers in a jury questionnaire and public records.
- Based on the information provided by the *Chicago Tribune*, the district judge, in concurrence with all parties, requested the U.S. Attorney's Office to conduct a background check on all jurors.
- Jury deliberations were halted following the *Chicago Tribune* disclosure and the hiatus continued during the investigation of the jurors by the U.S. Attorney's Office.
- During the five-day hiatus in jury deliberations, the exposé by the *Chicago*

Tribune was published revealing that, indeed, false answers had been given on a jury questionnaire and that the sitting jurors were now under investigation.

- Amidst questions raised by the district judge concerning the necessity of advising the jurors of their constitutional rights and their right to counsel, the individual examination of six sitting and three alternate jurors was begun.
- Through the judge's examination it was determined that a majority of jurors had provided false answers under oath and could face criminal prosecution. Many jurors who were interrogated told the district judge that they were scared, intimidated or sorry for what had occurred.
- During the course of the interrogations, the jurors were granted immunity from prosecution by the U.S. Attorney.
- Some jurors later hired lawyers in order to represent their own independent interests arising from their participation in the trial.
- Two jurors who provided untruthful answers were excused from further service while others so situated were retained.
- Before the hiatus in deliberation, jurors informed the court that they were having a conflict and yet after the interrogations the judge dismissed one of the jurors in the conflict without determining whether she was a holdout juror.
- Alternate jurors were seated, but not in the order required by Rule 24.

- After eight days of deliberation by the original jury, and five days in hiatus, a reconstituted jury deliberated for ten days and returned the verdicts in this case.

To describe the circumstances surrounding the jury management and jury deliberations summarized above as "nothing unusual" is to simply turn a blind eye to the realities of what occurred – in order to save the efforts expended during a six month trial.

Having summarized the factors that played upon the jurors, I'll now turn to an analysis of the various errors that accumulated. The errors in this case can be subdivided and analyzed in two groups. First, there is a structural error because of the jurors' irreconcilable conflicts of interest that resulted from the jury questionnaire situation. Second, the multiple errors regarding jury management generally and jury deliberation, when viewed collectively, were so corruptive that the verdicts cannot stand.

The Jury Questionnaire Issue

Although the defendants raised issues relating to the effect of false answers to jury questionnaires and "fearful" jurors in the trial court, they did not argue those issues on appeal. Nevertheless, the matters concerning false responses to the jury questionnaires concern structural errors in the trial that are not governed by the plain error analysis provided in Rule 52(b) of the Federal Rules of Criminal Procedure.

In fact, the structural errors that exist here make this case "subject to automatic reversal" because they affect the "framework in which the trial proceeds, rather than simply an error in the trial process itself." *Neder v. United States*, 527 U.S. 1, 8 (1999). "Such errors infect the entire trial process and

necessarily render a trial fundamentally unfair. Put another way, these errors deprive the defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Id.* at 8-9. "Among these basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury." *Gomez v. United States*, 490 U.S. 858, 876 (1989) (quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987); *Chapman v. California*, 386 U.S. 18, 23 (1967)).

As in this case, jurors take two oaths, the first requires them to answer questions truthfully in voir dire. The second requires that they faithfully perform their duties as jurors. A juror who violates either oath can face criminal prosecution. The Supreme Court has previously upheld the criminal conviction of a juror who intentionally lied during voir dire in order to gain entry onto, and then purposefully hang, the jury. *Clark v. United States*, 289 U.S. 1 (1933). Although *Clark* was decided almost seventy-five years ago, *the prosecution of jurors for misconduct still occurs today. See generally Dyer v. Calderon*, 151 F.3d 970, 973 n.1 (9th Cir. 1998) (*en banc*) ("We do not condone any lying by jurors; perjury is perjury."); *United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989) (noting that jurors committing criminal misconduct can be prosecuted for perjury and contempt of court and can be subject to restitution claims from the government).

The government instituted this prosecution against defendants Warner and Ryan. But, of course, the government is also responsible for investigating

and prosecuting crimes involving juror misconduct. The inconsistent jury questionnaire answers given in this case could lead to criminal investigations and prosecutions.

The verdicts here were delivered by a jury whose number included some who themselves faced potential future criminal prosecution for their actions that occurred during this trial. Can sitting jurors fearing possible criminal investigations and prosecution for conduct involved in the case under consideration render valid verdicts?

In ruling on the defendants' post-trial motions in September of 2006, the district judge dismissed the concern of allowing jurors to return verdicts in the same trial in which their conduct might subject them to criminal investigation and prosecution. She concluded that "in spite of the difficulties generated by this very lengthy, high-profile trial, these jurors were diligent and impartial." R. 867 at pg. 65. "[I]t is implausible that the retained jurors would harbor any fears of prosecution. As for the remaining jurors, who were not specifically questioned about their questionnaires, they would have no reason to conclude that they were targets of any investigation." *Id.* at pg. 87.

Can this court, as a matter of common sense, accept the district court's factual determination that at least some jurors did not harbor fears of prosecution when they rendered their verdicts? Can the majority say that these jurors retained their capacity to render fair and impartial verdicts that can strip the defendants of their liberty and result in the defendants receiving significant prison sentences

after the jurors themselves were the subject of an investigation?

In examining the district court's decision to allow these jurors to return verdicts, that decision should be examined in the extraordinary context that had developed. After serving for six months on an extremely high profile trial with overwhelming media and public scrutiny, and eight days into the deliberations, on Thursday, March 23, 2006, the jurors' deliberations were stopped. When they returned four days later on Monday, March 27th, the jury was not allowed to continue deliberating. Instead, six of the sitting jurors and three alternate jurors were interrogated by the district judge. They were called one-by-one into the judge's chambers. Questions regarding inconsistent answers on the jury questionnaire form were asked. Jurors Ezell and Pavlick were ultimately dismissed, to be replaced by the two alternates. Four of the six sitting jurors were retained. The jury deliberations were stopped during this two day period and the reconstituted jury would not start the second round of deliberations until Wednesday, March 29th.

Much like children called into the principal's office, one could imagine the strain that this inquiry placed on both the jurors who were questioned and those who remained in the jury room unquestioned. It is noteworthy that in describing her experience in examining Juror Casino, the district judge stated, "Grilling Mr. Casino is one of the most distasteful things I have done in this job." Mar. 28, 2006 Tr. at pg. 24658, ln. 25 & pg. 24659, ln. 1. It is also reasonable to conclude that the jurors who were called into the judge's chambers began discussing

their experience with the other jurors upon return to the jury room to figure out what was going on.

Even more telling is that the district judge on March 27th recognized, along with various counsel, the specter of juror prosecution lurking in the case and the impact this would have on the trial. March 27th and 28th are key days in the case because these are the two days that the district judge considered how to handle the juror questionnaire issue and thus it is worth examining closely the record from these two days. The district judge, shortly before her examination of then-sitting Juror Ezell, recognized that the jurors faced possible criminal charges for juror misconduct when she observed:

> A concern I have, beginning with Ms. Ezell, is that if we were to bring Ms. Ezell in to ask questions of her regarding her failure to disclose this arrest record that she has and other issues – for example, the apparent use of an alias – **Do we have to advise her of her rights? Do we have to give her an opportunity to have counsel?** Because it does seem to me that we will be asking her potentially about **criminal conduct**, specifically **perjury** in connection with her responses to the questionnaires.

Mar. 27, 2006 Tr. at pg. 24366, lns. 16-24 (emphasis added). Prosecutor Collins added that "I do think to the extent there are consequences to a criminal prosecution [of the jurors] we would be recused from it if there was even contemplation of such a thing." Mar. 27, 2006 Tr. at pg. 24386, lns. 19-22.

Mr. Genson, an attorney for defendant Warner, added that his client was in a Catch-22 situation:

> Certainly, when I have a client that's charged essentially – at least that was a good deal of the closing argument – with concealing, hiding, there is charges of obstruction, false statements, the idea that I want to tell these jurors, "You have a right to a lawyer," is ludicrous. It doesn't help me to do that. I don't want to do it.
>
> On the other hand, I am suggesting to your Honor that perhaps we should. It's not to my interest to tell these jurors, or at least in my client's interests to tell these jurors, they need a lawyer. I mean, I don't need to introduce all those things given the charges against my client.
>
> But I do think it's a valid – if something happens in this case and if some other prosecutorial body, given that Mr. Collins said that they would be recused, decides to prosecute people for false statement and we haven't given them their rights, I mean, I just feel that – I think that's at least an issue that your Honor has to consider.

Mar. 27, 2006 Tr. at pg. 24404, ln. 25 & pg. 24405, lns. 1-17.

The court recessed for lunch in the middle of its juror interrogation procedure on March 27th. After lunch, Mr. Collins informed the parties and the court that the U.S. Attorney had granted the jurors immunity.

> For the record, we did consult, your Honor, with the U.S. Attorney at the lunch break in terms of jeopardy any jurors would have going forward. And we did not address the issue in advance of Ezell and Pavlick, and I would make this of record.
>
> Our office – [U.S. Attorney] Fitzgerald has indicated that he believes that it's more important to get the candid information from the jurors than have them – the process chilled by them – any statements they say being used against them. And so he authorized me to make a statement that any statements these jurors make *going forward* would not be used against them.

Mar. 27, 2006 Tr. at pg. 24500, lns. 16-25 & pg. 24501, lns. 1-2 (emphasis added). Note that the immunity grant covered the jurors' statements "going forward." The record does not reflect whether the U.S. Attorney granted immunity to the jurors for their original conduct of their answers provided during voir dire on the questionnaire and therefore there is a potential that these jurors could still face criminal prosecution. The district court proceeded in questioning the jurors informally without an advisement of rights and without the presence of lawyers for the jurors.

Jurors who ultimately would render the verdicts now faced conflicts sufficient enough to have a federal district judge and several experienced attorneys consider whether these jurors needed to be advised of their constitutional rights. And we have an experienced prosecutor, the United States Attorney, who sees this situation as serious enough to grant

immunity to the jurors. Yet these same jurors were returned to the jury room, instructed to begin anew their deliberations. The reconstituted jury ultimately rendered the verdicts in this case.

When the district judge wonders aloud whether warning jurors of their constitutional rights is required, when jurors could need their own lawyers, and when the U.S. Attorney is issuing immunity grants to jurors, it is impossible not to recognize the extraordinary nature of the case. These circumstances are not "usual" and far from the way our criminal justice system should work.

In addition, the district court's ruling from September 2006 that "it is implausible that the ... jurors would harbor any fears of prosecution," R. 867 at pg. 87, is not supported by the record. Although counsel was not appointed for the jurors, individual jurors would obtain private counsel in this case. Juror Pavlick had previous representation and mentioned his attorney when he was interrogated individually by the district court. Jurors Peterson and Losacco would both later inform the court that they had obtained counsel. Several of the individual jurors questioned during this period recognized that they had made inconsistent statements on the juror questionnaire and some apologized for the mistake. Other jurors specifically mentioned that they were scared or intimidated by the situation.

Furthermore, this is not a situation in which the district court can solve the problem by saying that the jurors made an honest mistake. The decision as to whether to investigate and prosecute a case is not the district court's to make but rather the prosecutor's decision. Additionally, the question of whether a juror

incorrectly but honestly answered a question or intentionally lied to get onto a jury is a question of fact for a *second* jury in a future criminal proceeding.

Despite recognizing the potential of "fearful" jurors, the district court was unwilling to declare a mistrial. In addressing the defendants' argument that the investigation had impacted the jurors' ability to be fair and impartial the district court responded:

> The ... argument you are making is that we now have a bunch of fearful jurors. ***I just don't know how to address that.***
>
> Again, I understand that the defendants do have important interests to represent here. I have before me–nobody has called it this, but this is a motion for a mistrial at this point. If I grant this motion, these defendants are going to be tried again. I don't – I am just–I am really wondering whether if I grant the motion for a mistrial, I am effectively saying it isn't possible to pick a jury for this case.

Mar. 28, 2006 Tr. at pg. 24699, lns. 16-25 & pg. 24700, ln. 1 (emphasis added). The obvious – but onerous – way to address this situation was to declare a mistrial. In any event, the concern regarding the selection of a new jury should not have been a consideration. It is not difficult to understand the great pressure generated by a six month trial to reach verdicts in this case. Nevertheless, jurors in fear of prosecution for conduct involved in the case on which they are sitting should not be allowed to render verdicts, their bias is inherent.

As a matter of law, biased jurors cannot be fair and impartial. Fair and impartial jurors are required as part of the defendants' structural protection for a

fair trial and therefore the defendants are entitled to an automatic reversal of their convictions. *Neder*, 527 U.S. at 9.

The majority responds that the defendants were afforded the structural protections of a fair trial before a fair and impartial jury and therefore any error relating to jury misconduct, improper influence of the jury and jury bias should be reviewed under harmless error. Maj. Op. 53-54. "The bias of a ... juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law." *United States v. Wood*, 299 U.S. 123, 133 (1936). As Chief Justice Marshall explained at the trial of Aaron Burr, there are certain situations in which a juror "may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice." *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807). Although the "[u]se of the 'implied bias' doctrine is certainly the rare exception," *Hunley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992) (per curium), as we recognized in *United States v. Polichemi*,

> The concept of implied bias is well-established in the law. Many of the rules that require excusing a juror for cause are based on implied bias, rather than actual bias. For example, a court must excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has even a tiny financial interest in the case. *See, e.g., United States v. Annigoni*, 96 F.3d 1132, 1138 (9th Cir. 1996); *Getter v. Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995). Such a juror may well be objective in

> fact, but the relationship is so close that the law errs on the side of caution.

219 F.3d 698, 704 (7th Cir. 2000) (Wood, D., J.); *see, e.g., Smith v. Phillips*, 455 U.S. 209, 221-24 (1982) (O'Connor, J., concurring); *Conaway v. Polk*, 453 F.3d 567, 587-88 & n.22 (4th Cir. 2006) (noting that "implied bias [is] a settled constitutional principle" and providing citation to cases from ten different Circuits since 1982 recognizing the continuing applicability of the implied bias doctrine); *Brooks v. Dretke*, 418 F.3d 430, 430-31 (5th Cir. 2005) (overturning a conviction on the basis of implied jury bias when a juror faced a pending criminal charge filed by the same prosecutor's office that was prosecuting the case on which the jury was presiding); *Dyer*, 151 F.3d at 984 (citing *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (C.P. 1610) (tracing the lineage of the implied bias doctrine to Sir Edward Coke's dicta in *Dr. Bonham's Case* in 1610)).

A biased juror "is a juror in name only" who taints the court and the jury's verdict making it a "mere pretense and sham." *Clark*, 289 U.S. at 11. The verdicts returned by these biased jurors should be vacated because only a jury composed of fair and impartial jurors can strip the defendants of their liberty. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

General Management of the Jury and Jury Misconduct

It is also necessary to review additional jury misconduct and the jury management decisions of the district judge. Errors of a nonstructural nature are analyzed under Federal Rule of Criminal Procedure 52, where errors raised by the defendants are

reviewed under a harmless error standard and those not raised are reviewed under a plain error standard.

The majority determines that on appeal the defendants raised three specific issues about the jury: (1) that the verdict was tainted by the jurors' use of extraneous legal materials; (2) that the dismissal of Juror Ezell was an arbitrary removal of a defense holdout, and; (3) that the substitution of jurors after deliberation had begun was prejudicial. Maj. Op. p.2. In addition, the majority notes that the defendants have not raised on appeal the issue of the cumulative and prejudicial effect of jury misconduct and therefore that issue is not before us – although raised below. *Id.*

The majority correctly observes that jury management or control measures properly lie within the discretion of the district judge. Maj. Op. p.52. Nevertheless, courts of appeal have supervisory authority in fashioning standards of criminal procedure to be followed by the district courts. Wayne R. LaFave, et al., Criminal Procedure § 1.6(i) pg. 325 (2d ed. 1999).

I disagree with the narrowed scope of review advanced by the majority. What follows is a discussion of a more global look at the juror misconduct and jury management involved in this case.

Of course, as repeatedly pointed out, this court is guided by the Supreme Court's instruction that the defendants are guaranteed a right to a "fair trial," not a "perfect trial." *McDonough Power Equip. Inc. v. Greenwood*, 464 U.S 548, 553 (1984).

As to the internet research regarding the law, there is no dispute that Juror Peterson brought

outside material into the jury room during deliberations while she and a number of jurors were in conflict with Juror Ezell. A number of jurors urged Juror Peterson to search the internet and bring back to the jury information on jury deliberation. Her research could be used to show Juror Ezell the "error of her ways." This entire episode was a deliberate disregard of the admonition of the court not to bring outside legal sources into the jury room.

Juror Peterson claims that the material was an American Judicature Society article about deliberations and she had no intent to inappropriately influence Juror Ezell. Juror Ezell disputes this claim, countering that the information related to bribery and was used to threaten her so that she would vote with the other jurors. Regardless, it is clear that Juror Peterson brought outside material into the jury room during the course of deliberations and used this material as part of the jurors' efforts to convince Juror Ezell to join them in returning a verdict.

In her post-trial ruling, the district court determined that the article on jury deliberation "did not pertain to any substantive issue in the Defendants' trial. It concerned only the process of deliberation, and the substance of the article did not contradict any instruction that this court gave to the jurors." R. 867 at pg. 81. Errors in the jury deliberation process raise issues of law no different that errors relating to substantive matters, such as obstruction of justice. Both procedural and substantive areas of law are equally important. Moreover, a court cannot hide behind saying that the unauthorized article contained a proper statement of the law. It is axiomatic that jurors are not allowed to

bring in any outside materials into deliberations regardless of whether they are a correct statement of the law. Jurors are restricted to receiving pronouncements on relevant law only from the trial judge.

The seriousness of this misconduct is demonstrated by the fact that Juror Peterson and Juror Losacco, who were involved with Juror Peterson in the conflict with Juror Ezell, both obtained private counsel to represent them on this issue. The record does not reflect whether Jurors Peterson and Losacco retained their attorneys during deliberations or after deliberations as Juror Ezell did not make a public allegation against Jurors Peterson and Losacco until after the verdicts had been returned. However, when the district court conducted a post-verdict inquiry on this issue, both Jurors Peterson and Losacco appeared through their respective counsel.

The jurors originally sent notes informing the district court that they were in conflict. This is the conflict between Juror Ezell and several of the other jurors including Juror Peterson. Juror Peterson was instructed by several other jurors to – "do her homework" – meaning to find information on the internet which the jurors could use in a hope of convincing Juror Ezell to join their views.

However, during the period that the district judge was considering what to do about the conflict among the jurors, she was also informed about the juror questionnaire problem. Thus, the court was faced with two independent problems, the jury conflict issue and the juror questionnaire issue. Yet, the juror questionnaire issue *wholly consumed* the district

judge's consideration of the case at that point. The district judge left unresolved her consideration of the conflict between potential "holdout" Juror Ezell and other jurors. Nowhere in the record does the district judge make a ruling as to whether a conflict existed between Juror Ezell and the other jurors to determine if the jurors had deadlocked or if Juror Ezell was indeed a holdout. Nor did the court determine the impact that dismissing Juror Ezell would have on the other jurors in light of the conflict among the jury as expressed to the court in the jurors' notes, and whether this might give an indication to other jurors that the court was siding with the views of one group of jurors over another. However, the district judge ultimately excused Juror Ezell based on the inconsistent statements Juror Ezell made on her questionnaire.

At the beginning of the trial, the district judge ordered the juror questionnaires to be redacted, yet she used the jurors' names during in-court voir dire. This allowed the *Chicago Tribune* to obtain the jurors' names from the transcripts of the in-court voir dire despite the fact that the court had originally placed the jurors' names under seal. As Prosecutor Collins later noted, "a trained monkey" could have matched the information together between the publicly redacted questionnaires and in-court voir dire transcripts. Mar. 27, 2006 Tr. at pg. 24591, ln. 22. Because jurors' names were "in effect" leaked to the media during the trial, the court was unable to avoid the larger issue of a juror background investigation by the media and the impact this had on the trial.

Apart from the general admonitions made by the court it appears that there was little control of the

jurors' exposure to external influences outside of the courthouse. In addition to Juror Peterson's misconduct, the jurors continued to read newspapers and were exposed to media coverage of the trial, the jurors received inquiries from friends and family about the case, and the jurors discussed the case with outsiders while the case was pending. All of these actions were taken in violation of the court's instructions, yet a reconstituted jury was allowed to deliberate and return verdicts.

There is often a lack of a record on key issues. The district judge participated in a discussion with the parties but did not state that she was providing a definite ruling. Thus, the record is at best inconclusive, and at the worst nonexistent, on the district court's decisions on many of the critical issues in this case. The most striking example is the reseating of the alternate jurors. Once the district judge decided to excuse Jurors Pavlick and Ezell, the court was required, pursuant to Rule 24, to seat alternate jurors in the order in which they were selected. However, in the reseating process the district judge skipped the next juror in line, Alternate Juror Masri. We know that he was skipped but the district judge did not say why he was passed over.

The majority deduces that Alternate Juror Masri was dismissed for his failure to disclose a prior DUI. But, there is no ruling from the district judge to support the majority's deduction. The government suggested at oral argument that Masri was excused because he received his juror certificate and was thanked for his service. But there is no record excusing him or indicating why he did not serve. Thus, the record does not demonstrate compliance with Rule 24.

At oral argument before this court, Prosecutor Collins stated that "Judge Pallmeyer is a consensus builder." Oral Arg. at 47:18. This insightful comment is the key to understanding the non-structural juror errors. Consensus building can help in finding common ground in disputes. It can also help to expose decision makers to alternative points of view. But consensus building can have negative consequences as this case demonstrates.

Consensus building by the district judge allowed a continual round robin of discussions between the attorneys and the court especially during the critical period of March 27th and 28th when the parties and the court were addressing the juror related issues. Transcripts from this period reveal a very conscientious but irresolute judge who is willing to contribute her views and concerns to the conversation involving contested issues, but is reluctant to provide firm rulings that end the court's consideration of those issues. The record from this period is full of conversations but lacks definitive rulings. Consensus building does not always lead to the resolution of difficult issues.

A lack of definitive rulings by the trial court presents great difficulty in a review on appeal, for appellate courts review decisions, not commentary. Importantly, the lack of a firm ruling infects the consideration of excusing potential "holdout" Juror Ezell. In her post-trial ruling, the district judge said that Juror Ezell was "removed from the jury for reasons wholly unrelated to [the] conflict [occurring between the jurors] revealed in [Juror] Losacco's note." R. 867 at pg. 75. Yet, the district judge's post-trial decision did not provide citation to the record on this point. In fact, a review of the record during the

March 27th and 28th period shows there was absolutely no consideration of the conflict between Juror Ezell and other jurors. As noted earlier, this very serious issue was forgotten once the court and parties were made aware of the trouble in the jurors' questionnaire answers by the *Chicago Tribune*.

The district judge is charged with the management and control of the jury. In the deliberation phase this includes ensuring that the jurors properly conduct themselves, avoiding outside influences, conduct proper deliberations without juror-on-juror intimidation, and scheduling deliberation times, among others.

As noted, many of the problems that plagued the trial after the case was submitted to the jury could have been avoided through sequestration. While it was certainly impractical to sequester this jury during the trial phase, sequestration during deliberations was a viable option.

In a full sequestration, deliberating jurors are typically under control of Deputy United States Marshals who are responsible for ensuring that the jurors are secure during their deliberations, in movement to and from the courthouse and jury room, and while housed offsite until a verdict is reached. Partial sequestration works less of a hardship on jurors. Under this system the deliberating jurors assemble at a remote location and are picked up by Deputy United States Marshals, transported by van to the courthouse and moved in a nonpublic elevator to the jury room. At the end of a days' deliberations the process is reversed. This continues until a return of the verdict.

Despite these available options there was no apparent consideration of such sequestration even in the face of the overwhelming media presence in the courthouse, the daily media reports of courtroom activity and the jurors' continued inability during the course of the trial to avoid media reports of the trial. The relative inconvenience to the jurors weighed against a possible mistrial makes the choice of sequestration during deliberation seem clear.

Turning again to the actual deliberations, it appears that jurors were inexplicably allowed to set their own schedule for deliberations with apparently little judicial intervention. There is undisputed evidence that the jurors separated into caucuses at times during deliberations. Perhaps most striking is the example of the division between the "healthy" and the "unhealthy" jurors. The healthy jurors exercised by running up and down internal courthouse stairs while the unhealthy jurors took smoke breaks outside the courthouse. The record does not tell us if the jurors continued separate deliberations during this period outside of the presence of the other jurors.

As noted above, I recognize that individual nonstructural errors are reviewed under either harmless error or the plain error analysis as provided in Rule 52 and we afford the district judge a level of deference. However, the nonstructural errors – in their totality – were so egregious that again a mistrial was the only permissible result. The majority's failure to consider all of these errors cannot be ignored as we must recognize that these errors undermine the public's confidence in the "fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736-37 (1993).

In the final analysis, this case was inexorably driven to a defective conclusion by the natural human desire to bring an end to the massive expenditure of time and resources occasioned by this trial – to the detriment of the defendants. Given the breadth and depth of both structural and nonstructural errors, I have no doubt that if this case had been a six-day trial, rather than a six-month trial, a mistrial would have been swiftly declared. It should have been here.

Based on either the structural errors or nonstructural errors described above concerning jury misconduct, the convictions in this case should be vacated and the case remanded for a new trial. Because the majority reaches a contrary result, I respectfully Dissent.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

OCTOBER 25, 2007**
OPINION PUBLISHED NOVEMBER 1, 2007

Before**

Hon. FRANK H. EASTERBROOK, *Chief Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*
Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*
Hon. DIANE S. SYKES, *Circuit Judge*

Nos. 06-3517 & 06-3528

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAWRENCE E. WARNER AND
GEORGE H. RYAN, SR.,

Defendants-Appellants.

** This Order was originally released in typescript on October 25, 2007.

**** Hon. Joel M. Flaum and Hon. Ilana Diamond Rovner took no part in the consideration or decision of this matter.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division. Nos.
02-CR-506-1, 4—**Rebecca R. Pallmeyer**, *Judge.*

ORDER

On August 28, 2007, defendants-appellants filed a petition for rehearing with suggestion for rehearing *en banc,* and on September 11, 2007, plaintiff-appellee filed an answer to the petition. The panel has voted to deny the petition for rehearing. A vote on whether to grant rehearing *en banc* was requested, and a majority of the judges in regular active service have voted to deny the petition. Judges Posner, Kanne, and Williams's joint opinion dissenting from the denial of rehearing *en banc* is appended.

The petition is therefore DENIED.

POSNER, KANNE, and WILLIAMS, *Circuit Judges,* dissenting from the denial of rehearing en banc. The panel opinions are long, but the essential case for rehearing en banc can be gleaned from the 18 bullet points in the dissent from the panel majority opinion:

- In a case that was tried over a six month period, the jurors entered and exited the courthouse every day past scores of television and still cameras and reporters.

- The jurors used public elevators and brushed elbows with anyone who happened to be in them.

- Although the court's intent was not to make the jurors' names public, that effort was compromised when the jurors' names were used in the in-court voir dire.

- When jury deliberations were ready to commence in the most high profile case in Chicago in recent memory, there was no thought of sequestering the jury.

- During the initial eight days of deliberations an apparent holdout juror was purportedly threatened by other jurors with a charge of bribery.

- Legal research gained by a juror from the internet was-contrary to the court's instruction-brought into the jury room in an effort to persuade the recalcitrant juror to change her position.

- A reporter for the *Chicago Tribune* advised the district court during jury deliberations that the newspaper's research had disclosed major inconsistencies between answers in a jury questionnaire and public records.

- Based on the information provided by the *Chicago Tribune*, the district judge, in concurrence with all parties, requested the U.S. Attorney's Office to conduct a background check on all jurors.

- Jury deliberations were halted following the *Chicago Tribune* disclosure and the hiatus continued during the investigation of the jurors by the U.S. Attorney's Office.

• During the five-day hiatus in jury deliberations, the exposé by the *Chicago Tribune* was published revealing that, indeed, false answers had been given on a jury questionnaire and that the sitting jurors were now under investigation.

• Amidst questions raised by the district judge concerning the necessity of advising the jurors of their constitutional rights and their right to counsel, the individual examination of six sitting and three alternate jurors was begun.

• Through the judge's examination it was determined that a majority of jurors had provided false answers under oath and could face criminal prosecution. Many jurors who were interrogated told the district judge that they were scared, intimidated or sorry for what had occurred.

• During the course of the interrogations, the jurors were granted immunity from prosecution by the U.S. Attorney.

• Some jurors later hired lawyers in order to represent their own independent interests arising from their participation in the trial.

• Two jurors who provided untruthful answers were excused from further service while others so situated were retained.

• Before the hiatus in deliberation, jurors informed the court that they were having a conflict and yet after the interrogations the judge dismissed one of the jurors in the conflict

without determining whether she was a holdout juror.

- Alternate jurors were seated, but not in the order required by Rule 24.

- After eight days of deliberation by the original jury, and five days in hiatus, a reconstituted jury deliberated for ten days and returned the verdicts in this case.

United States v. Warner, No. 06-3517, 2007 WL 2363220, at *34-35 (Aug. 21, 2007) (Kanne, J., dissenting). "To describe the circumstances surrounding the jury management and jury deliberations summarized above as 'nothing unusual' is to simply turn a blind eye to the realities of what occurred." *Id.* at *35.

We agree with the panel majority that the evidence of the defendants' guilt was overwhelming. But guilt no matter how clearly established cannot cancel a criminal defendant's right to a trial that meets minimum standards of procedural justice. "If the police, after arresting [the defendant], and obtaining an eyewitness identification of him plus his confession, had taken him directly to the penitentiary on the ground that a trial would be a waste of time for someone so patently guilty, he would be entitled to release on habeas corpus; he would have been deprived of his liberty without due process of law." *Walberg v. Israel*, 766 F.2d 1071, 1074 (7th Cir. 1985). Or "if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant

wants or is willing to accept." *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985); see also *United States v. Bownes*, 405 F.3d 634, 636 (7th Cir. 2005). The Supreme Court has held that a judge may not grant a directed verdict in a criminal case no matter how overwhelming the defendant's guilt, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977), and that "a criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him." *Edwards v. Balisok*, 520 U.S. 641, 647 (1997). Likewise if the jury is partial, as we noted just last month in *United States v. Vasquez-Ruiz*, No. 06-2180, 2007 WL 2695639 (7th Cir. Sept. 17, 2007), and perhaps if it is just plain befuddled. Cf. *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1084-86 (3d Cir. 1980).

This case is within the orbit of these principles, as the panel majority seems to have sensed; for while it pointed out that a number of objections to the conduct of the trial had been waived, it went on to discuss those objections and satisfy itself that they were unfounded or that any errors identified by them were harmless. But harmlessness is not the test of reversible error when a cascade of errors turns a trial into a travesty.

Against this it will be argued that ours is an adversary system, that a judge is just an umpire, and that it is not his or her business what procedures the opposing parties' lawyers want the trial to be governed by. But these are at best half-truths. There is an independent judicial interest in the proper functioning of the adjudicative process. That interest is at its zenith in a criminal jury trial.

We are also concerned that the panel majority opinion, unless set aside, will be read as an endorsement of laissez-faire appellate review, and that its discussion of the merits of the issues that it thought were waived or involved only harmless errors will have the force of precedent in future cases. The opinion signals an excessively tolerant attitude toward the management decisions of trial judges, as when it says that "the fact that the trial may not have been picture-perfect is, in itself, nothing unusual," 2007 WL 2363220, at *1. That is a misleading metaphor. A picture-perfect trial, especially a picture-perfect jury trial, is not only unusual; it is rarer than a hen's tooth. To suggest that the trial in this case *may* have been, at worst, of merely average imperfection may be taken by district judges in this circuit to mean that this court is largely indifferent to how trials are conducted, believing that to be the business of trial judges. Mainly it is. But a federal trial judge has an independent duty, enforceable if necessary by the appellate court, to manage a jury trial with alert concern for the difficulty of eliciting reliable determinations from the lay persons who make up a jury, and with recognition that the difficulty grows rapidly with the length of the case.

Regarding the first point—the difficulty of eliciting reliable determinations from the lay judges whom we call jurors—one of the disturbing features of the trial in this case was the investigation, and potential prosecution, of jurors who had made misstatements on their juror questionnaires. Not only did these misstatements cast doubt on the jurors' ability to serve, but the court's grilling of the jurors on this topic may have prevented them from

performing their duty conscientiously and undistractedly. They faced potential prosecution by a *party* to the case—the federal government. They may have feared perjury charges, having seen first-hand in the trial that the government prosecutes people for making false statements. Had the government fully immunized the jurors from prosecution, and had the jurors known this, there is the considerable risk that they would have been biased in favor of the government. But even if the jurors did not know that any offer of immunity had been made, they may have decided to convict the defendants in order to avoid provoking the government's ire and inviting a retaliatory prosecution of them (the jurors). The government's attempt to immunize jurors itself suggests the proceedings were broken beyond repair.

Regarding the second point—the problems associated with the length of the trial—federal trial judges (bankruptcy judges and magistrate judges as well as district judges) recognize and discharge a duty of active trial management. (So much for the umpireal analogy.) They do not defer abjectly to the lawyers' preferences regarding length of trial, number of exhibits, wording of instructions, and so forth. They often override the strong preferences of the lawyers on both sides regarding such matters. They are not umpires when it comes to management of the trial; they are directors of the drama that we call trial by jury. (Trials are closer to theater than they are to ball games.) Of course, management decisions are committed to the trial judge's discretion. But that discretion can be abused, as it was in this case, resulting in a distended trial. The trial should not have taken anywhere near the six months that it did take. Its excessive length contributed both to the

procedural errors that marred it and to the failure of judicial correction of those errors.

In civil cases, it is common for the trial judge, well before the trial begins, to go over with the lawyers the list of witnesses that each side intends to call. The judge quizzes the lawyers carefully, asking with regard to each name on the list: Why do you want to call this witness? If you do call him, what (in general terms) will he be testifying about? What will that testimony add to your case? How lengthy would his testimony be and what would he cover that requires that length of time? Do you really need witness *X* to discuss topic *A* when you already have *Y* to discuss it? Can the parties agree to a stipulation in lieu of some of the evidence? Invariably after such an interrogation, the witness lists are found to be richly padded and the testimony sought to be elicited from each witness found to be full of redundancies and irrelevancies. The management-conscious judge conducts the same inquiry with respect to the documentary evidence that the lawyers want to present, which also often exceeds the reasonable limits of jurors' comprehension.

When as much of the padding of the case (that is, the case as it had been prepared by the lawyers) as possible has been removed, the judge asks the lawyers how much time they anticipate for the trial, and then fixes a limit on the length of the trial, usually a tighter limit than the lawyers want. The limit is tentative, however—flexible, not rigid. As the trial proceeds, it may become apparent that more time is needed, and if so the judge will raise the limit.

Now it is true that the practice in criminal trials is different, mainly because the scope of pretrial

discovery is so much more limited in criminal cases than in civil ones. No statute or rule empowers the judge in a federal criminal case to require witness statements or other discovery to be provided ahead of time. On the contrary, 18 U.S.C. § 3500(a) provides that "no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." Similarly, Fed. R. Crim. P. 26.2(a) requires production upon motion of a statement of a defense witness (other than the defendant) only after that witness has testified on direct examination. These rules are motivated in part by concerns with possible tampering with witnesses.

But although judges cannot force the lawyers to exchange their witness lists early on, they can persuade the lawyers to do so, and should unless there are concerns with possible witness tampering. That case to one side, the *Manual for Complex Litigation* § 32.24 (Fed. Judic. Center, 3d ed. 1995), explains that "prosecutors can generally be persuaded to make early production since, by giving the defense an opportunity to prepare, it will avoid interruptions at trial and may lead to a plea."

The Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351, 399-402 (1960), recommends pretrial conferences in complex criminal cases, and cites one judge as having said that he was able to shorten a criminal trial from eight months to 59 days by holding such a conference. *Id.* at 400. The *Handbook* recommends other measures

as well that trial judges can use to reduce the length of federal criminal trials, *id.* at 402-03, as does the *Manual for Complex Litigation, supra*, §§ 32.11, 32.22, 32.33, which underscores the importance of the trial judge's

> insisting, within the limits demanded by fairness, that the case move expeditiously to conclusion; and encouraging cooperation among counsel; while recognizing counsel's obligation of zealous advocacy, the court can encourage them to confine themselves to issues that are reasonably disputable and not to assert rights that will have no impact on the outcome but whose exercise can cause delay.... Although criminal trials require greater circumspection in the exercise of judicial control than civil trials, the judge should not hesitate to exercise such control as is necessary to maintain order and momentum. *Unless the judge does so, such a trial may take on a life of its own, jeopardizing due process rights and imposing unreasonable costs and burdens.* ... The seriousness of the issues at stake may lead the attorneys to try the case leaving no stone unturned. This requires the judge to assert and retain control of the proceedings in order to move them to an expeditious conclusion. The trial schedule is an important aspect of that control .... [W]hatever the schedule, interruptions should be avoided .... Unnecessary witnesses and exhibits should be eliminated as much as possible during pretrial; some may, however, become unnecessary only after developments at trial. The judge should exclude witnesses or exhibits that are

> obviously redundant or otherwise unnecessary, and should curtail redundant and needlessly lengthy interrogation. [Emphasis added, citations omitted].

All the legal authority a trial judge needs for streamlining a criminal trial is the judiciary's inherent authority to manage trials with due regard for eliciting intelligent consideration of the issues by the jurors, plus Rule 403 of the Federal Rules of Evidence, which allows the judge to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." As the *Manual for Complex Litigation* points out, Rule 403 is enforced most effectively when it is applied before the trial begins, so as to avoid lengthy sidebars. Motions in limine are of course common, and frequently granted, in criminal as in civil trials.

We have authorized the trial judges in criminal trials to place time limits on testimony. *United States v. Vest*, 116 F.3d 1179, 1186-87 (7th Cir. 1997), while pointing out that they "are best used as guideposts rather than deadlines in criminal trials, and...are no substitute for involved trial judges who must always shepherd trials along, curtailing repetitive, irrelevant and immaterial questioning."

None of these powers to prevent unduly protracted trials has to lie dormant until awakened by a motion. The importance of the trial judge's vigorous exercise of his or her powers lies in the fact that a trial of the length of the trial in this case places excessive strain

on the jury system. It is, to begin with, difficult to assemble a competent jury if you warn the prospective jurors that the trial may go on for six months. In fact the judge in this case warned that it would last "only" four months. We do not know how the jurors felt when they discovered that their tour of duty had been extended without forewarning or their consent.

Moreover, the longer the trial, the less likely the jury is to be able to render an intelligent verdict. Jurors become overwhelmed by the volume of evidence and numbed by its repetitiousness. Their attention flags; their minds wander; the witnesses—there were more than a hundred in the trial of the two defendants—get mixed up in the jurors' minds, or forgotten; the profusion of exhibits—there were more than a thousand—makes the documentary record unintelligible. The impressions created by the closing arguments are likely to wipe out everything that went before. Jury comprehension has been found to diminish after a mere 20 days of trial. Richard Lempert, "Civil Juries and Complex Cases: Taking Stock After Twelve Years" 20 (Center for Research on Social Organization Working Paper Series #488, Nov. 1992), http://deepblue.lib.umich.edu/dspace/bitstream /2027.42/5 1254/1/488.pdf, visited Sept. 21, 2007; *A Handbook of Jury Research* § 3.02(c), p. 3-6 (Walter F. Abbott & John Batt eds. 1999).

Twenty days and up happens also to be the top category of federal trials by length, and fortunately few federal criminal trials last that long. *Annual Report of the Director of the Administrative Office of the United States*, 2006, tab. T-2, http://www. uscourts.gov/judbus 2006/ contents.html (visited

Sept. 21, 2007). Why did this one? What was special about it? The prominence of defendant Ryan? That is not a proper reason in a legal system that aspires to equal justice for all.

A study in which jurors in long (more than 20 days) and short (1 to 6 days) federal trials (albeit civil rather than criminal) were interviewed found a number of disquieting differences. Jurors in the long trials were substantially more likely to be retired or unemployed and substantially less likely to have a college education. Nearly three-fourths of the jurors in the lengthy trials said the evidence was "difficult" or "very difficult" to understand, compared to 30 percent who reported the same in short trials. Of course the length of the trial might be correlated with the complexity of the evidence, and the latter might be the befuddling force. But this would not adequately explain why twice as many jurors in long than in short trials reported their attention wandering during the presentation of evidence either "occasionally" or "quite a lot," and why more than twice as many (amounting to almost half of all the jurors who were interviewed) found it difficult or very difficult to understand how they were supposed to reach a verdict. Joe S. Cecil et al., *Jury Service in Lengthy Civil Trials* 1, 9, 11-13, 28 (tab. 7), 33 (tab. 8) (Fed. Judic. Center 1987).

So now imagine jurors' mental state after six months, bearing in mind that memory loss and the psychological or cognitive problems of jurors in a super-long trial compound the first problem, the difficulty of recruiting competent jurors for protracted trials: a less intelligible trial is heard by a less capable jury. The longer the trial, moreover, the

likelier jury misconduct becomes. The jurors become bored, impatient, irritated; the judge's instruction against discussing the case before the jury retires to deliberate becomes increasingly irksome and likely to be disobeyed.

And the parties (more often the defendant than the prosecutor, since a conviction is a more likely outcome of a federal criminal trial than an acquittal) lose, as a practical matter, much of the protection that the judge is supposed to provide against jury misconduct. Imagine how a district judge who has spent six months presiding at a trial, doubtless bored to tears much of the time by its meandering pace, feels about the prospect of granting a mistrial and thus condemning herself (unless the parties settle) to the agony of trying the same case over again. And if the first trial wasn't boring, the second has got to be excruciatingly so since the judge is hearing all the evidence for the second time. So can a defendant who moves for a mistrial at the end of a six-month trial hope for a fair shake? The district judge seems to have been influenced in denying a mistrial by concern—unrelated to the merits of declaring a mistrial—with the difficulty of impaneling an impartial jury for a second trial when the first trial had received so much publicity, in no small part because of its length and its management problems. She said: "I have before me—nobody has called it this, but this is a motion for a mistrial at this point. If I grant this motion, these defendants are going to be tried again. I don't—I am just—I am really wondering whether if I grant the motion for a mistrial, I am effectively saying it isn't possible to pick a jury for this case."

We are not alone in our concerns about protracted trials. "Exceedingly lengthy trials lead to reduced concentration and recollection of events on the part of all participants, particularly witnesses and jurors. In very long cases, exhaustion may diminish everyone's performance. The quality and representative nature of the jury may be reduced by the fact that many citizens—often the most competent—are unable or unwilling to take the time to sit for cases lasting weeks or months." Gordon Van Kessel, "Adversary Excesses in the American Criminal Trial," 67 *Notre Dame L. Rev.* 403, 478-79 (1992); see also "Principle 12: Courts Should Limit the Length of Jury Trials Insofar as Justice Allows, and Jurors Should Be Fully Informed of the Trial Schedule Established," in American Bar Association, *Principles of Juries and Jury Trials* (Aug. 2005); Patrick E. Longan, "The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials," 35 *Ariz. L. Rev.* 603, 703-07 (1993). Arizona offers extra compensation to jurors who serve for more than 5 (!) days. Ariz. Rev. Stat. § 21-222(C).

The role of the courts of appeals in protecting jurors and litigants from excessively protracted criminal trials that strain the capacities of jurors, and by doing so undermine procedural justice, merits plenary consideration by this court.

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No. 07-977

In the Supreme Court of the United States

LAWRENCE E. WARNER AND GEORGE H. RYAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' due process rights to a fair and impartial jury were violated when the district court dismissed two deliberating jurors solely on the ground that they misrepresented their criminal background during voir dire and were not forthcoming during the district court's subsequent inquiry, and then substituted jurors in compliance with Federal Rule of Criminal Procedure 24(c)(3).

2. Whether the district court's interviews of jurors, some of which were at petitioners' request, constituted structural error.

3. Whether the court of appeals erred by failing to consider the cumulative effect of problems arising during jury deliberations when the court found only one harmless error and petitioners did not argue on appeal that the alleged errors had a cumulative, prejudicial effect.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-91a) is reported at 498 F.3d 666. The opinion of the district court (Pet. App. 108a-243a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2007. A petition for rehearing was denied on October 25, 2007 (Pet. App. 92a-93a). The petition for a writ of certiorari was filed on January 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners

were convicted of racketeering conspiracy, in violation of 18 U.S.C. 1962(d), and multiple counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346. Petitioner George Ryan was also convicted of three counts of making material false statements in a matter within the jurisdiction of the Federal Bureau of Investigation, in violation of 18 U.S.C. 1001; obstructing and impeding the Internal Revenue Service, in violation of 26 U.S.C. 7212; and four counts of filing false tax returns, in violation of 26 U.S.C. 7206. Petitioner Lawrence Warner was additionally convicted of attempted extortion, in violation of 18 U.S.C. 1951; two counts of money laundering, in violation of 18 U.S.C. 1956; and structuring a financial transaction, in violation of 31 U.S.C. 5324. Ryan was sentenced to 78 months of imprisonment and Warner was sentenced to 41 months of imprisonment, both to be followed by one year of supervised release. See Gov't C.A. Br. 2; Ryan J. 2; Warner J. 3. The court of appeals affirmed. Pet. App. 1a-68a.

1. Ryan was elected as Illinois Secretary of State in November 1990 and was re-elected in 1994. Warner was Ryan's close friend and unpaid advisor. As Secretary of State, Ryan was responsible for awarding contracts, following competitive bidding, and granting leases, following the staff's review of alternative sites. Ryan circumvented the process by steering contracts and leases to friends and associates, including Warner, from whom he received financial benefits. As a result of the scheme, petitioners received hundreds of thousands of dollars in benefits, including financial support for Ryan's successful 1998 campaign for governor of Illinois. Pet. App. 3a-4a.

2. Before jury selection, prospective jurors completed a 110-question, 33-page form, which covered,

among many other topics, their criminal and litigation histories. Counsel, as well as the court, questioned the prospective jurors. The district court ultimately seated 12 jurors and eight alternates. Pet. App. 4a; Gov't C.A. Br. 21.

On March 13, 2006, following the six-month trial, the jury began deliberations. On March 20, Juror Ezell sent the court a note, also signed by the foreperson, complaining that other jurors were calling her derogatory names and shouting profanities. After conferring with counsel, the court instructed the jury to treat one another "with dignity and respect." Pet. App. 5a-6a. Two days later, Juror Losacco sent the court a note, signed by seven other jurors, asking if Ezell could be excused because she refused to engage in meaningful discourse and was physically aggressive. The court again conferred with counsel and observed that "[Losacco] has not told us anything about the way the jury stands on the merits. She really has not." *Id.* at 6a. Defense counsel did not assert otherwise. The next morning, the court responded by note, instructing the jury that "[y]ou twelve are the jurors selected to decide this case," and should treat each other with dignity and respect. *Ibid.*

Shortly after instructing the jury, the district court learned that the Chicago Tribune had reported that one of the jurors had responded untruthfully about his criminal background in the questionnaire. Following Warner's counsel's suggestion, the court asked the government to investigate Juror Pavlick's criminal history. The background check confirmed that Pavlick had an undisclosed felony DUI conviction and misdemeanor reckless conduct conviction. The court questioned Pavlick and granted Warner's motion to dismiss Pavlick from the jury. Neither the government nor counsel for

Ryan objected to the motion or the court's ruling. Pet. App. 6a; Gov't C.A. Br. 23-24.

Background checks on other jurors, all conducted either without objection or at petitioners' request, also revealed undisclosed information. Ezell had seven criminal arrests, including charges of possessing cocaine with intent to deliver, assault, battery, and disorderly conduct, and she had used a false name in connection with one of those arrests. She also had an outstanding warrant for driving on a suspended license. The government told the court that, had it known that Ezell provided false booking information, it would have moved to excuse her for cause because Ryan was also charged with providing false information to law enforcement officers. The court questioned Ezell, who acknowledged her untruthfulness but was not completely forthcoming. Pet. App. 6a-7a; Gov't C.A. Br. 24-27.

In deciding whether to dismiss a juror, the district court stated that it would adopt the standard established in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), which required the court to determine whether the juror gave "an untruthful answer to one of the questions on the juror form," and "if so, would a correct answer to that question have provided a valid basis for a challenge for cause." Gov't C.A. Br. 29. Applying that standard, the district court concluded that Ezell "concealed and withheld a great deal of information," and that, had she responded honestly, she would have been dismissed for cause. *Id.* at 27, 29. Warner's counsel agreed. *Id.* at 27. Ryan's counsel initially took no position, but subsequently objected to application of the *McDonough* standard. Nonetheless, he agreed that Ezell should be dismissed under the lower standard for

dismissal that he proposed. Pet. App. 6a-7a; Gov't C.A. Br. 27-28.

Two other jurors were interviewed, at petitioners' request, after the parties learned that they had failed to disclose bankruptcy filings from the mid-1990s in response to the question about whether they had ever appeared in court or been involved in a lawsuit. Both stated that they did not believe that the questionnaire called for their listing the bankruptcy filings and petitioners did not move to dismiss them. See Pet. App. 7a-8a.

Petitioners sought to dismiss other jurors on the ground that they had lied on their questionnaires. For example, Juror Svymbersky, an alternate, had failed to disclose that he stole a bicycle at age 18 or 19 in 1983 and thought that the charge had been expunged. Juror Rein had been arrested for slapping his sister, but had never appeared in court, and Juror Casino had forgotten that he had been arrested 40 years earlier when he was in his early 20s. Following additional questioning of Casino and Svymbersky, the court credited their testimony, as well as that of Rein, that they had not recalled the incidents when completing their questionnaires and declined to dismiss them. Pet. App. 7a-8a.

In light of the dismissals of the two sitting jurors, the court seated alternates Svymbersky and Juror DiMartino. In accordance with Federal Rule of Criminal Procedure 24(c)(3), the court questioned them to ensure that they had no discussions or exposure to publicity about the case, and both satisfied the court that they had not. The court also instructed the jury that it must restart its deliberations. It questioned the remaining original jurors individually to make sure that each understood the need to deliberate anew and was capable of

doing so. The court then reread its entire charge to the reconstituted jury. It additionally instructed the jury that it should not consider the court's questioning of them or the fact that two jurors were excused, emphasizing that the inquiry resulted from the media and not from the lawyers in the case. Pet. App. 8a-9a; Gov't C.A. Br. 35-36.

The reconstituted jury deliberated for ten days, during which time it requested guidance on a matter that the original jury had not sought. It convicted petitioners on all counts. Pet. App. 9a, 37a.

After the verdict, Ezell publicly criticized the jury and the verdict. Among other complaints, Ezell alleged that Juror Peterson brought into the jury room extraneous information about removing a juror for cause. The court granted defense counsel's motion for an inquiry, and it interviewed both Ezell and Peterson. Peterson acknowledged that she brought into the jury room a two-page article by the American Judicature Society (AJS) about substituting alternate jurors and a handwritten note of her own thoughts about a juror's duty to deliberate. Pet. App. 9a-10a; Gov't C.A. Br. 53-55. The district court denied petitioners' motions for a new trial, concluding that Peterson made "a really innocent mistake," and that "this episode did not prejudice the outcome." Gov't C.A. Br. 56.

3. The court of appeals affirmed. Pet. App. 1a-68a.

a. At the outset, the court of appeals noted that petitioners did not argue on appeal that the problems with the jury had a cumulative, prejudicial effect, Pet. App. 3a, or that any juror issues constituted structural error, *id.* at 66a. Nor, the court explained, did petitioners claim that the evidence was insufficient to support any of the charges on which they were convicted. *Id.* at 3a.

While petitioners raised numerous other objections, the court observed that "the district court handled most problems that arose in an acceptable manner, and * * * whatever error remained was harmless." *Ibid.*

In particular, the court of appeals held that the district court did not abuse its discretion when it ordered substitutions of Ezell and Pavlick after eight days of deliberations. The court determined that the district court had applied the correct legal standard, established by this Court in *McDonough*, when it considered whether to dismiss jurors based on their responses during voir dire, and that it consistently applied that standard in its rulings. Pet. App. 24a-30a.

The court of appeals also found no support in the record for petitioners' claim that Ezell was dismissed because of her pro-defense views of the evidence. Even if the prosecution suspected that Ezell was a "defense holdout," and the court did not credit that defense assertion, the court of appeals stated that "[s]o long as the court was not hoodwinked into believing there was cause where there was none (and it was not), the removal was proper." Pet. App. 30a, 31a. Nor did the court find support in the record that Ezell's removal "potentially chilled the expression of pro-defense jurors in deliberations," especially in light of the district court's instructions to the jury. *Id.* at 32a (quoting Pet. C.A. Br.). Similarly, the court rejected petitioners' claim that the background checks of the jurors prejudiced the defense by fostering a pro-government bias as a result of the jurors' exposure to criminal liability. The court explained that, not only did petitioners request many of the checks, but the district court's instructions "precluded any bias against the defense by preventing the jurors

from knowing about the extent of the background checks." *Ibid.*

The court of appeals next considered petitioners' contention that the replacement of the jurors after eight days of deliberation deprived them of their right to a fair trial and an impartial jury. That argument, the court noted, was without merit in light of the 1999 amendment to Federal Rule of Criminal Procedure 24(c), which explicitly authorizes the replacement of deliberating jurors with alternates so long as the alternates have not discussed the case before replacing an original juror and the jury is instructed to restart deliberations. The court further observed that the reconstituted jury deliberated for ten days and requested additional instructions on matters that the original jury had not sought. Pet. App. 33a-38a.

b. Judge Kanne dissented. Pet. App. 69a-91a. He would have reversed the convictions and remanded for a new trial based on two arguments that petitioners had not raised on appeal: that jurors' conflicts of interest created structural error, and that the cumulative effect of multiple errors in jury management and jury deliberation produced an unfair trial. Judge Kanne opined that "there is a structural error because of the jurors' irreconcilable conflicts of interest that resulted from the jury questionnaire situation" and that "the multiple errors regarding jury management generally and jury deliberation, when viewed collectively, were so corruptive that the verdicts cannot stand." *Id.* at 72a.

c. The court of appeals denied petitioners' petition for rehearing en banc. Pet. App. 92a-93a. Judges Posner, Kanne, and Williams dissented. Although they agreed that the "evidence of [petitioners'] guilt was overwhelming," they stated, for the reasons in Judge Kan-

ne's dissent from the panel decision, that the trial did not meet minimum standards of procedural justice. *Id.* at 96a.

4. In this Court, petitioners filed an emergency application for bail pending certiorari. After requesting a response from the government, Justice Stevens denied the application.

ARGUMENT

1. Petitioners first contend (Pet. 11-16) that the district court erred by removing and substituting jurors after deliberations began. That contention lacks merit, was partially forfeited, and does not warrant this Court's review.

a. The substitution was authorized by Federal Rule of Criminal Procedure 24(c)(3), which authorizes replacement of a juror by an alternate "after the jury retires to deliberate," and specifies that, "[i]f an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew." As the court of appeals explained, the district court correctly determined that two jurors and one alternate—Pavlick, Ezell, and Masri—should be dismissed because they deliberately withheld information that would have provided grounds for their dismissal for cause. Pet. App. 25a-29a. For example, in connection with one of Ezell's seven undisclosed arrests, she gave false information to law enforcement authorities (C.A. App. 463-464, 506)—conduct similar to a charge against Ryan.

There was nothing wrong with the removal of those jurors. Indeed, petitioners did not object to dismissing Ezell, Pavlick, or Masri (other than as to the legal standard employed by the district court)—and thereby for-

feited that objection. Pet. App. 6a, 7a, 8a; see pp. 4-5, *supra.*

In addition, the court of appeals found no basis in the record for concerns that Ezell's removal "potentially chilled the expression of pro-defense jurors in deliberations," or "that the district court dismissed Ezell because of her view of the evidence or that the prosecution tricked the district court into dismissing Ezell for cause based on its belief about Ezell's view of the evidence." Pet. App. 31a-32a. Rather, Ezell's views were unknown to the litigants and court at that time, and petitioners never argued otherwise when she was dismissed. C.A. App. 411, 534. The jury was instructed that "the circumstances that brought about the fact that these two jurors were excused * * * were not prompted by * * * your previous deliberations." *Id.* at 590.

Nor is there any other indication that the substitution was improper. Before allowing the reconstituted jury to begin deliberations, the district court ensured that the two new jurors had not discussed the case and had not been exposed to prejudicial media coverage, and that each of the remaining original jurors was capable of deliberating anew and disregarding what had gone before. C.A. App. 523-524, 579-584. Moreover, the court reread its instructions to the jury and removed from the jury room all items from the previous deliberations. Gov't C.A. Br. 34, 48. The reconstituted jury deliberated for ten days, and before returning a verdict, the jury asked for information that was not requested by the original jury. See Pet. App. 37a. As the district court found, the jurors who deliberated to judgment were "diligent and impartial" and "made every effort to be fair, even amid extraordinary public scrutiny." C.A. App. 84. This Court does not review the concurrent fac-

tual findings of two courts below "in the absence of a very obvious and exceptional showing of error," *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996), which is not the case here.

b. Petitioners misconstrue (Pet. 13) the court of appeals' opinion as holding that, so long as a court adheres to Rule 24(c)(3), "a violation of the Constitution" is "authorized." The court said no such thing. Instead, it rejected petitioners' contention that "almost any decision to substitute [during deliberations is] prejudicial," Pet. App. 38a, and determined that the substitutions were appropriate on the facts of this case. Nor have petitioners cited any case that stands for the proposition that a defendant's Fifth and Sixth Amendment rights are violated when a district court dismisses jurors based on their intentional and material misrepresentations during voir dire and the record unequivocally establishes that the jurors' view of the evidence played no role in those dismissals. Indeed, petitioners' suggestion (Pet. 24) that Ezell was dismissed because of her pro-defense viewpoint is refuted by their agreement that she, as well as Pavlick, should be dismissed for lying on the juror questionnaires. Pet. App. 6a, 7a. And, notwithstanding petitioners' claim (Pet. 12) that this case is unprecedented in "American jurisprudence," two circuits have recently reviewed high-profile cases involving juror replacement and, deferring to the trial courts, upheld the verdicts reached by reconstituted juries. *United States* v. *Kemp*, 500 F.3d 257, 301-306 (3d Cir. 2007), cert. denied, 128 S. Ct. 1329 (2008); *United States* v. *Ronda*, 455 F.3d 1273, 1296-1301 (11th Cir. 2006), cert. denied, 127 S. Ct. 1327, and 127 S. Ct. 1338 (2007).

c. Nor does this case implicate a circuit split. Ordinarily, "the presiding judge can make appropriate find-

ings and establish whether a juror is biased or otherwise unable to serve without delving into the reasons underlying the juror's views on the merits of the case." *United States* v. *Thomas*, 116 F.3d 606, 621 (2d Cir. 1997). In such cases, including this one, the courts of appeals review a juror's dismissal under the good-cause standard of Federal Rule of Criminal Procedure 23(b)(3) for abuse of discretion. See, *e.g.*, *United States* v. *Ginyard*, 444 F.3d 648, 651-652 (D.C. Cir. 2006) (district court's decision to dismiss juror for job-related reasons reviewed for abuse of discretion); *United States* v. *Edwards*, 303 F.3d 606, 631 (5th Cir. 2002) (district court's decision to dismiss juror based on his dishonesty in answering court's inquiry and bringing extraneous material into jury room reviewed for abuse of discretion), cert. denied, 537 U.S. 1192 (2003); *United States* v. *Gibson*, 135 F.3d 257, 259 (2d Cir. 1998) (district court's decision to remove juror because of claim of illness reviewed for abuse of discretion).

Some courts have applied a heightened standard in cases in which a juror refuses to deliberate, or advocates jury nullification, because of the risk that the requested dismissal is based on the juror's view of the evidence. Under those circumstances, courts have held that a juror may not be dismissed if there is a (reasonable) possibility that the requested removal is based on the juror's views on the merits of the case. See *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999); *Thomas*, 116 F.3d at 622; *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). See also *United States* v. *Abbell*, 271 F.3d 1286, 1302 & n.14 (11th Cir. 2001) (using term "substantial" possibility, but emphasizing that it was applying the same standard as *Brown*), cert. denied, 537 U.S. 813 (2002). As the Fifth Circuit explained

in *Edwards*, however, the holdings of those cases do not extend to situations, such as this one, where the basis for removal does not implicate the jury's deliberative process:

> *Brown*, *Thomas* and *Symington* stand for the limited proposition that a court may not dismiss a juror based upon its conclusion that the juror is failing to participate in the deliberative process in accordance with law unless there is no possibility that the juror's problem stems from his view of the sufficiency of the evidence. Even at its broadest, the reasoning of these cases extends only to those dismissals where the juror's conduct cannot be evaluated without delving into the reasons underlying the jurors' views of the case, *i.e.*, where the deliberative process has been implicated.

303 F.3d at 633. See also *United States* v. *Vartanian*, 476 F.3d 1095, 1098-1099 (9th Cir.) (reviewing dismissal based on juror's lack of candor about her contacts with the defendant's family for abuse of discretion and distinguishing *Symington* on ground that dismissal was not based on juror's willingness to deliberate or her views on the case), cert. denied, 128 S. Ct. 323 (2007); *United States* v. *Carson*, 455 F.3d 336, 352 (D.C. Cir. 2006) (reviewing dismissal of juror based on his mental health problems for abuse of discretion and distinguishing *Brown* on the ground that dismissal had "nothing to do with the juror's view of the case"), cert. denied, 127 S. Ct. 1351 (2007).

This case does not trigger the heightened standard because the district court dismissed the jurors because they had lied in their questionnaires—an inquiry that was unrelated to the jurors' views of the evidence. In-

deed, even if the heightened standard applied, petitioners would not benefit because the record establishes that there was no possibility that the dismissal (to which petitioners did not object) was based on the jurors' (unknown) views of the evidence. Instead, as discussed above, it was based on their dishonesty during voir dire.

Petitioners' assertion (Pet. 15-16) of a conflict on the standards governing substitution is similarly unsupported. As the court of appeals recognized, the cases on which petitioners rely pre-date the 1999 amendment to Rule 24. Pet. App. 35a. Under that prior version of the Rule, juror substitution during deliberations violated Rule 24(c), and the courts were required to determine, under a harmless-error analysis, whether a defendant was prejudiced by the substitution. *Ibid.* Those cases say nothing about the standard of review following the change in the Rule, which permits substitution.

In any event, there was no conflict before the rule change. Petitioners claim (Pet. 15-16) that *United States* v. *Register*, 182 F.3d 820 (11th Cir. 1999), cert. denied, 530 U.S. 1250 (2000), conflicts with *United States* v. *Josefik*, 753 F.2d 585 (7th Cir.), cert. denied, 471 U.S. 1055 (1985), but the two cases are in harmony. In *Register*, the Eleventh Circuit held that the substitution of an alternate for a deliberating juror requires reversal "only where there is a reasonable possibility that the district court's violation * * * *actually* prejudiced [the defendant] by affecting the jury's *final verdict*." 182 F.3d at 842. The Seventh Circuit in *Josefik* adopted a similar rule: "only prejudicial violations of the rule are reversible errors." 753 F.2d at 587. Thus, the two cases do not conflict.

2. Petitioners also contend (Pet. 16-22) that the district court's interviews of some of the jurors about their

responses during voir dire constituted structural error requiring automatic reversal. Petitioners did not preserve that claim below and, in any event, it is without merit.

Petitioners themselves insisted on much of the questioning. As the court of appeals explained, "many of the investigations were done at the request of the defense." Pet. App. 66a. For example, Jurors Gomilla and Talbot were questioned about bankruptcy filings they made ten and 11 years earlier, which the defense had discovered by combing court records over the weekend. Petitioners insisted on those inquiries, over the government's objection, even though the only voir dire question that arguably called for such information appeared under the heading "Criminal Justice Experience." See C.A. App. 481, 487, 493. Petitioners ultimately declined to move to dismiss Gomilla or Talbot. *Id.* at 518. As the court of appeals explained, petitioners "cannot embed a ground of automatic reversal into a case" by insisting on questioning jurors and then arguing that the questioning they demanded requires automatic reversal. Pet. App. 66a. Nor did petitioners argue below that the questioning constituted structural error. See *id.* at 67a, 72a.

Moreover, there was no error, much less structural error, in the questioning. As the court of appeals recognized, Pet. App. 66a-67a, this Court's decision in *Remmer* v. *United States*, 347 U.S. 227 (1954) (*Remmer I*), disposes of petitioners' structural error argument by holding that even interrogation of a deliberating juror by law-enforcement officers about an extraneous contact is subject to harmless error analysis (as opposed to automatic reversal). *Id.* at 228-230 (remanding for determination whether extraneous influence was harmless). By requiring an inquiry into prejudice, *Remmer I* makes

clear that questioning of a juror does not per se prevent his continued service as a juror.[1]

Petitioners point out (Pet. 18) that, in *Remmer* v. *United States*, 350 U.S. 377 (1956) (*Remmer II*), this Court ordered a new trial "even over the lower court's finding of no prejudice." But the Court reversed in *Remmer II* not on the ground that prejudice was irrelevant, but instead because the district court had undertaken an "unduly restrictive" inquiry into whether prejudice had resulted in that case. *Id.* at 382. This Court then held that "on a consideration of all the evidence uninfluenced by the District Court's narrow construction of the incident," the defendant had established prejudice and was entitled to a new trial. *Ibid.* Thus, neither *Remmer I* nor *Remmer II* treated law-enforcement questioning of jurors as structural error; instead, they rested on whether the defendant had actually been prejudiced. See also *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982) ("[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.").

The proceedings below demonstrate that courts can evaluate, on a case-by-case basis, the prejudicial effect of questioning of jurors. As the court of appeals explained, the district court "took every possible step to ensure that the jury was and remained impartial, and, through credibility findings and findings of fact, con-

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[1] Petitioners discount *Remmer I*'s prejudice requirement by observing that it was decided before "'structural error' came into this Court's lexicon." Pet. 18. But this Court has never retreated from *Remmer I*'s holding. See, *e.g.*, *United States* v. *Olano*, 507 U.S. 725, 738 (1993) (citing *Remmer I*, 347 U.S. at 227, in support of the proposition that "[w]e generally have analyzed outside intrusions upon the jury for prejudicial impact").

cluded that this one was." Pet. App. 68a. The court of appeals correctly deferred to the district court's first-hand assessment of the jury: "[T]he jurors who deliberated to verdict in this case were diligent and impartial . . . . They sat attentively through nearly six months of evidence . . . . The court believes these jurors made every effort to be fair, even amid extraordinary public scrutiny." *Id.* at 22a (quoting district court's findings).

Petitioners' factbound challenge to those findings does not merit this Court's review, and is wrong in any event. When questioning jurors, the district court took pains to ensure that the questioning would not affect a juror's ability to be fair and impartial. See, *e.g.*, C.A. App. 524, 578 (assuring Svymbersky that questioning was "generated by media, not by anybody in here," and receiving Svymbersky's assurance that the questioning would have "no bearing over [his] judgment in this trial"); *id.* at 548 (receiving assurance from Rein that questions did not make him feel that he had to please the court or to "please one side or please the other in connection with your deliberations"); *id.* at 551, 575 (receiving assurance that Casino could be fair). The district court also explained to the reconstituted jury that the questioning and the dismissal of two jurors was "not prompted by any of the lawyers or by the parties in this case, nor by your previous deliberations, those of you who were here. Rather, the inquiry was generated by members of the media. It is not related to the lawyers in this case. * * * [N]one of my questions should be considered in any way as you deliberate." *Id.* at 590.

Moreover, the conduct of the reconstituted jury demonstrates that it was not intimidated or pressured into returning a guilty verdict. After being painstakingly reinstructed, the reconstituted jury began deliberations

that lasted for ten days. See Pet. App. 9a, 37a. During the second round of deliberations, the jury asked for additional instructions that the original jury had not sought. *Id.* at 37a. Those are not the actions of a jury that has been pressured or intimidated into returning a verdict for the prosecution. Instead, they show that the jury was diligently and impartially fulfilling its duty.

While petitioners (Pet. 18) rely on press reports that jurors faced perjury investigations, they ignore the district court's finding that "there is no indication in the record that any jurors saw more than headlines in connection with this matter." C.A. App. 87. Nowhere in the transcript is there an indication that the jurors read press reports about possible investigations of the jurors themselves. Instead, the record reflects that the jurors were not aware of the press reports and had only tangential exposure to them. See *id.* at 525, 546, 551-552.

Petitioners state (Pet. 19) that the prosecutors offered to immunize the jurors. No discussion of immunity took place in front of jurors, however. In the course of in camera discussions about the questioning of jurors, the court asked the parties whether the jurors should be given any warnings regarding self-incrimination. Tr. 24,366, 24,385-24,389, 24,392, 24,402-24,403, 24,405-24,410, 24,412-24,414. The government responded that anything the jurors said would not be used against them. Tr. 24,500-24,501. Although the court told one juror (Gomilla) that nothing she said would be used against her, that warning was not repeated for other jurors, and the defense raised no objection. See Pet. 19; Tr. 24,502.[2]

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[2] While petitioners assert (Pet. 18) that at least three jurors retained attorneys, they did so *after* the verdict, when the defense filed motions and made statements in the media alleging juror misconduct and re-

3. Finally, petitioners contend (Pet. 22-28) that the court of appeals erroneously considered the effect of each alleged jury error in isolation rather than considering their cumulative effect. That contention is not properly presented here.

The court of appeals explained that it did not conduct a cumulative-error analysis because, in that court, petitioners did "not argue that the problems with the jury had a cumulative, prejudicial effect, even though they made this argument in their motion for a new trial before the district court." Pet. App. 3a. Because petitioners abandoned their cumulative-error challenge in the court of appeals, and that court did not address the challenge, it is not properly before this Court. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).[3]

Petitioners' contention (Pet. 22-23) that the court of appeals' decision is in conflict with decisions of this Court and other courts of appeals simply ignores the fact that the court of appeals did not consider the cumulative error question because petitioners had abandoned it. Cf. *United States* v. *Jawara*, 474 F.3d 565, 581 n.10 (9th Cir. 2007) (declining to conduct cumulative error analysis where the defense did not raise such a claim on appeal). The Seventh Circuit has conducted cumulative error review when the issue was properly preserved. *E.g.*, *United States* v. *Santos*, 201 F.3d 953 (2000). Indeed, petitioners cite *no* decision of *any* court of appeals declining to conduct cumulative-error review where, un-

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questing investigations of the jurors. See, *e.g.*, Losacco Mot. to File Amicus Curiae Br. 1-2.

[3] Petitioners note (Pet. 24) that their court of appeals brief referred to an "avalanche of errors." That phrase is not, however, equivalent to making a cumulative-error argument, especially considering that the court of appeals held there was only one error.

like here, that contention had been properly preserved and presented.[4]

Moreover, the district court and the court of appeals both determined that only one jury error occurred (the jury's consideration of the AJS material concerning the duty to deliberate). See Pet. App. 12a. With respect to *that* error, the court of appeals considered the totality of the jury's deliberations—including the substitution of jurors, subsequent re-commencement of deliberations, and supplemental jury instructions—in making its fact-bound harmlessness inquiry. See *id.* at 18a-22a. In an attempt to make out a predicate for a broader *cumulative error* claim, petitioners rely (Pet. 24-25) on allegations of error that are both unsupported by the record and contrary to the district court's factual findings and credibility determinations, which were affirmed by the court of appeals. For example, petitioners repeat their claim (Pet. 8; see Pet. 24) that there was an "astonishing effort" by the jurors to force out a "defense juror," when the district court found that there was no evidence to support such a claim. See C.A. App. 83-84, 646; p. 10, *supra*. Against that background, no colorable cumula-

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[4] Citing *United States* v. *Roach*, 502 F.3d 425 (2007), petition for cert. pending, No. 07-8277 (filed Dec. 10, 2007), petitioners argue (Pet. 22) that the Sixth Circuit also "refus[es] cumulative error review." In *Roach*, the court held that the defendants waived their claim of cumulative error because they argued it only perfunctorily on appeal. It also stated that the defendants had not demonstrated that the court committed "*any* error in the trial, much less that the cumulative effect of any such errors rendered the trial fundamentally unfair." 502 F.3d at 443 (internal quotation marks deleted). Like other courts, the Sixth Circuit has applied cumulative-error analysis in appropriate cases. See, *e.g.*, *United States* v. *Blackwell*, 459 F.3d 739, 770 (6th Cir. 2006) (internal quotation marks and citation omitted), cert. denied, 127 S. Ct. 1336 (2007).

tive-error argument exists, even if such a claim had been properly preserved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2008

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

LAWRENCE E. WARNER AND GEORGE H. RYAN,
PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
VOLUME II of II

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APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	**No. 02 CR 506-1,4**
	)	
LAWRENCE E. WARNER and GEORGE H. RYAN, SR.,	)	**Judge Rebecca R. Pallmeyer**
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Defendants Lawrence E. Warner and George H. Ryan, Sr. were charged in a 22-count second superseding indictment with (1) conspiring to use the resources of the State of Illinois for their personal and financial benefit and for the benefit of Ryan's family members, the Citizens For Ryan political campaign committee, and various political and business associates, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d); and (2) devising a scheme to defraud the people of the State of Illinois and the State of Illinois of money, property, and the right to the honest services of Ryan and other State of Illinois officials, in violation of the federal mail fraud statute, 18 U.S.C. §§ 1341, 1346. In addition, Defendant Ryan was separately charged with making materially false, fictitious, and fraudulent statements during several

FBI interviews in violation of 18 U.S.C. § 1001(a)(2); obstructing and endeavoring to obstruct the Internal Revenue Service in the correct reporting of income and the collection of taxes in violation of 26 U.S.C. § 7212(a); and filing materially false tax returns in violation of 26 U.S.C. § 7206(1). Defendant Warner was separately charged with extortion under the Hobbs Act, 18 U.S.C. § 1951; money laundering, 18 U.S.C. § 1956 (a)(1)(B)(i); and structuring currency transactions in violation of 31 U.S.C. §§ 5324(a)(3) and (d)(2). On April 17, 2006, following a six-month trial, a jury convicted both Defendants on all counts. Both have moved for a judgment of acquittal or, in the alternative, for a new trial. They argue that the evidence was insufficient to convict them on several of the charges, that the RICO charges were improper for several reasons, and that jury problems so infected their convictions as to violate due process. Defendant Warner argues, in addition, that he was prejudiced by being tried together with Defendant Ryan and that the court erred by denying his numerous requests for severance. For the reasons set forth in this opinion, the motions are granted with respect to Counts Nine and Ten and otherwise denied.

I. The Evidence Supported Defendant Ryan's and Warner's Convictions under Count One

Defendants Ryan and Warner were each convicted of one count of conspiring to violate RICO in violation of 18 U.S.C. § 1962(d). Ryan contends that the evidence was insufficient to establish that Ryan knew of the alleged conspiracy and intended to join it. Ryan Rule 29 Mot. at 3. In addition, both Defendants Ryan and Warner argue that the Government failed to prove that they knowingly agreed to the single

conspiracy charged in the Indictment. *See* Ryan Rule 29 Mot. at 2–4; Warner Rule 29 Mot. at 2–3. Ryan further contends that the alleged conspirators pursued divergent, at times conflicting, goals, which are inconsistent with the single, unitary objective alleged in the Indictment. Ryan Rule 29 Mot. at 3–4. Finally, Ryan argues that the Government failed to prove that the varied criminal conduct alleged in the Indictment was carried out by a single enterprise. Ryan Rule 29 Mot. at 4. Before addressing the Defendants' arguments, the court notes that its review of the jury's findings is extremely deferential. *United States v. Gougis*, 432 F.3d 735, 743–44 (7th Cir. 2005). The court views the evidence in the light most favorable to the government, and defers to the jury's credibility determinations. *Id.* at 743. Only if there is no evidence in the record from which the jury could find guilt beyond a reasonable doubt will the court overturn the jury's verdict. *Id.* at 743–44.

A. The Circumstantial Evidence of an Agreement to Violate RICO was Sufficient

"To prove a RICO conspiracy, the government must show (1) an agreement to conduct or participate in the affairs (2) of an enterprise (3) through a pattern of racketeering activity." *United States v. Olson*, 450 F.3d 655, 664 (7th Cir. 2006). Consistent with general conspiracy law, direct evidence of an agreement is not required to prove a RICO conspiracy; rather, "an agreement can be inferred from the circumstances." *United States v. Neopolitan*, 791 F.2d 489, 501 (7th Cir. 1986); see also *United States v. Diaz*, 876 F.2d 1344, 1352 (7th Cir. 1989) ("Because conspiracies are carried out in secret, direct proof of agreement is rare.") (citation and quotations omitted).

1. The Evidence Supported the Jury's Conclusion that Ryan Knew of and Intended to Join the Conspiracy

Ryan argues that his conduct during his terms as Secretary of State and Governor was incompatible with that the government's position that he knowingly acted to further the interests of a RICO conspiracy, as he "often acted contrary to his own interests" in serving the interests of the State. Ryan Rule 29 Mot. at 3. Several witnesses did testify that, generally, Ryan put policy considerations ahead of politics, *See, e.g.*, Tr. at 4010 (Fawell); Tr. at 13500 (Wright). There was, however, substantial evidence regarding specific transactions from which the jury could reasonably conclude that Ryan knowingly steered government benefits to his friends and associates. *See, e.g.*, Tr. at 10461–63 (Sherman) (testifying that Ryan intervened on Warner's behalf with respect to a lease in Joliet, Illinois); Tr. at 10162–65 (Nelson) (testifying that Ryan intervened on Warner's behalf with respect to a lease in Bellwood, Illinois); Tr. at 8143–46 (Covert) (testifying that Ryan insisted that the specifications for validation stickers include a requirement beneficial to Warner's client, American Decal); 6636, 6651 (Chamness) (Ryan asks an SOS employee to deal with Harry Klein with respect to a building in South Holland, and is later upset when he believes that the employee and not Ryan has told Klein that a deal has been struck.). Although the jury was not required to find that the State overpaid for the contracts and leases that were entered into, *United States v. Fernandez*, 282 F.3d 500, 507 (7th Cir. 2002), the jury could reasonably have concluded that Ryan's intervention on his friends' behalf had a negative

impact on the State. *See, e.g.*, Tr. at 11045–46 (Norusis) (testifying that the State overpaid for the Joliet and Bellwood leases); Tr. at 8635–37 (Covert) (testifying that the changes to contract specifications, which Ryan asked him to pull back quietly, would have fostered "open competition").

Ryan asserts that his alleged co-conspirators—in particular, Fawell, Swanson, Juliano and Udstuen—did not tell Ryan what they were doing, and suggests there is no basis for concluding that he joined a conspiracy with them. Ryan Rule 29 Mot. at 3. Based upon the evidence that Ryan personally steered contracts and leases to his friends and associates, the jury could reasonably conclude that Ryan knowingly embraced the conspiracy's common purpose, even if he did not "participate in every aspect of the conspiracy." *United States v. Magana*, 118 F.3d 1173, 1186 (7th Cir. 1997) (internal quotations and citation omitted); *cf.* Tr. at 5381–82 (Fawell) (testifying that Fawell, not Ryan, oversaw the use of state employees for political purposes). This evidence was bolstered by evidence that Ryan attempted to conceal the benefits he conferred upon, and received from, Warner and others. *See, e.g.*, Gov't Exs. 28-012, 28-024 (Ryan did not report gifts and benefits he received from Klein and others on his annual Statements of Economic Interest); Tr. at 8145 (Covert) (testifying that Ryan told him to withdraw changes to contract specifications disadvantageous to Warner "without drawing a lot of attention to it"); Tr. at 3551–52, 3580, 3584–85 (Fawell), 14546–49 (Sonneveld) (Ryan approves Fawell's recommendation to dismantle Inspector General's office). There was sufficient circumstantial evidence in the record for the jury to conclude that Ryan knew of and intended to join the

conspiracy, even if his co-conspirators did not divulge everything they were doing to further the conspiracy's interests.

2. The Record Supports the Jury's Finding of a Single RICO Conspiracy

"Multiple conspiracies exist when there are separate agreements to effectuate distinct purposes." *United States v. Ceballos*, 302 F.3d 679, 688 (7th Cir. 2002). By contrast, a single conspiracy exists when "the evidence, viewed in the light most favorable to the government, establishes that the co-conspirators joined to effectuate a common design or purpose." *Id.* If the government demonstrates that the "co-conspirators embraced a common criminal objective, a single conspiracy exists, even if the parties do not participate in every aspect of the scheme." *United States v. Jones*, 275 F.3d 648, 652 (7th Cir. 2001). Both Ryan and Warner contend that the evidence at trial was insufficient to prove a single RICO conspiracy.

As charged in the Indictment, the conspiracy's overall objective was to use state resources for the personal benefit of Ryan and his associates. *See* Indict. Count I, ¶¶ 9–17. In his Rule 29 motion, Ryan divides the co-conspirators into two categories: (1) those who were concerned with political objectives (Fawell and Juliano); and (2) those who were concerned with their own financial interests (Warner, Udstuen, Swanson, Drazek and Tom Ryan). Ryan Rule 29 Mot. at 3–4. Viewing the evidence in the light most favorable to the government, as the court is required to do, these purportedly competing goals do not, as Ryan contends, indicate multiple conspiracies. Rather, they were integral to the conspiracy's overall

objective to use state resources for personal benefit. Fawell and Juliano furthered the interests of the conspiracy by helping to conceal the improper use of state resources. *See, e.g.*, Gov. Ex. 01-019 (December 1994 Fawell memo to Ryan regarding the Inspector General's office); Tr. at 7039–40 (Juliano). Their actions benefitted Ryan politically, certainly, but they also allowed the conspirators to continue perpetrating their schemes. Indeed, the two interests went hand-in-hand: without continued access to the offices of government, there were no contracts, leases, or other benefits to share. And while Fawell did testify that he reigned in Warner's influence early in Ryan's first term as Secretary of State's Office, he also testified that he (Fawell) advised Warner to "get a couple of clients -- a couple of clients for the office, which is normal, and, you know, don't get involved in a lot of smaller stuff. " Tr. at 2768. Although Fawell believed that this was "normal" political behavior, it was a key component of the Indictment against Defendant Warner. *See* Indict. ¶¶ 4(B); 14–88.

Warner, for his part, contends that the "abundance of evidence" presented unrelated to Warner belies the Government's theory that Warner participated in a single conspiracy with his alleged co-conspirators. Warner Rule 29 Mot. at 2. As discussed, the government was not required to prove that Warner participated in every aspect of the alleged scheme, so the fact that the government put on evidence that did not pertain to Warner does not mean, or even suggest, that there were multiple conspiracies. The court concludes that the evidence was sufficient to prove a single objective.

B. The Evidence Was Sufficient to Support the Jury's Finding of a Single RICO Enterprise

Defendant Ryan argues that the evidence at trial failed to show that Ryan conducted the affairs of the State of Illinois, the enterprise identified in the Indictment, through a pattern of racketeering activity. Instead, Ryan contends that he acted through two distinct governmental offices, the Secretary of State and the Governor, which constitute distinct enterprises. Ryan Rule 29 Mot. at 5. To the extent that this argument is directed to the viability of the State as an enterprise, generally, this court previously addressed this issue at some length and concluded that the State of Illinois may serve as a RICO enterprise. See *United States v. Warner*, No. 02 CR 506, 2004 WL 1794476, at *13–16 (N.D. Ill. Aug. 11, 2004). Nothing in the evidence at trial persuades the court to revisit that conclusion.

Nor is the court persuaded that the evidence necessitates finding multiple enterprises. Although the majority of the schemes alleged in the Indictment originated during Ryan's tenure as Secretary of State, the performance of several of those schemes spanned Ryan's terms as both Secretary of State and Governor. *See, e.g.*, Count II, ¶¶ 89–97 (allegations concerning benefits received by Ryan from Harry Klein from 1993 through 2002); Count II, ¶¶ 98–115 (allegations concerning benefits received by Ryan from Ron Swanson from the mid-1990s through 2002). Moreover, money continued to flow from leases and contracts that Ryan steered to Warner during his years as Secretary of State even after Ryan took office as Governor. See Count II, ¶ 23 (stickers contract); ¶ 82 (Bellwood lease); ¶ 88 (Joliet lease).

Likewise, the false statement Counts (Counts Eleven through Thirteen) pertain to false statements then-Governor Ryan made to federal investigators about conduct that occurred during his tenure as Secretary of State. Consequently, the substance of the allegations in the Indictment and the evidence presented at trial do not lend themselves to being parsed in the manner advanced by Defendant Ryan. The court reaffirms its previous conclusion that the State of Illinois may, as a matter of law, serve as a RICO enterprise, and concludes that the evidence presented at trial was sufficient to support the jury's finding that the government proved a single enterprise.

II. Mail Fraud Counts

At the heart of the government's case against Defendants Ryan and Warner is a massive, unitary scheme "to defraud the people of the State of Illinois, and the State of Illinois, of money, property and the intangible right to the honest services of defendant Ryan and other officials and employees of the State of Illinois." Indict., Count II, ¶ 3. The Indictment sets out a scheme spanning from 1990 to 2002 that included the award of state contracts and leases, the provision of non-public information and participatory status in government decisionmaking, and the grant of low-digit license plates to Ryan's friends and supporters, including Warner, in exchange for monetary and non-monetary benefits to Ryan and those close to Ryan, all of which was concealed by various false statements, nondisclosures, and structured behavior. *Id.* at ¶¶ 4-6. Although the entirety of the scheme is set out in Count Two, mailings related to particular sequences appear as separate counts.

The jury convicted Ryan and Warner on each count alleged against them. Ryan and Warner challenge this verdict as insufficiently supported by the evidence. Namely, Ryan argues that "there has been *no showing* that Ryan took official action 'in return' for cash, gifts or some other compensation." Ryan's Rule 29 Mot. at 8. Warner argues that the government never demonstrated his access to material nonpublic information or that he made material false statements. Warner's Rule 29 Mot. at 3–5. Warner also argues that the mailing in Count Two was not in furtherance of the scheme. Warner's Post-Trial Mot. at 24–25. In addition, both Defendants argue that there was a prejudicial variance between the single scheme charged in the indictment and the multiple schemes proved at trial. Ryan's Post-trial Mot. at 66; Warner's Rule 29 Mot. at 2. The defendants also challenge the verdict on strictly legal grounds. Ryan asserts that these counts were unconstitutionally vague. Ryan's Rule 29 Mot. at 18. Warner asserts that the court erred in referencing state law in instructing the jury on these counts. Warner's Post-Trial Mot. at 22.

As noted, in considering the sufficiency of the evidence, the court must view the evidence "'in the light most favorable to the prosecution, and as long as any rational jury could have returned a guilty verdict, the verdict must stand.'" *United States v. Hausmann*, 345 F.3d 952, 955 (7th Cir. 2003) (quoting Jones, 222 F.3d at 352)). In *United States v. Henningsen*, the Seventh Circuit stated:

> The mail fraud statute prohibits devising a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or

> promises," and executing that scheme by use of the mails. 18 U.S.C. § 1341. A conviction must satisfy three elements: (1) the defendant's participation in a scheme to defraud; (2) the defendant's intent to defraud; and (3) the defendant's use of the mails in furtherance of the fraudulent scheme.

387 F.3d 585, 589 (7th Cir. 2004). Under the mail fraud statute, a "scheme or artifice to defraud" includes a scheme to deprive a person or persons (in this case, the citizens of Illinois) of their intangible right to honest services. 18 U.S.C. § 1346. "As direct evidence of a defendant's fraudulent intent is typically unavailable, 'specific intent to defraud may be established by circumstantial evidence and by inferences drawn from examining the scheme itself that demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension.'" *United States v. Owens*, 301 F.3d 521, 528 (7th Cir. 2002) (quoting *United States v. Paneras*, 222 F.3d 406, 410 (7th Cir. 2000)).

Ryan notes that no government witness ever testified that he saw Ryan take a "corrupt dollar" and no one ever testified that Ryan took an official action with regard to any of the contracts or leases at issue in return for a gift or some benefit. Ryan's Rule 29 Mot. at 8–9. Without such testimony, Ryan argues, the evidence is not sufficient to support his conviction of mail fraud. To the extent that Ryan is arguing that he had to personally benefit from the scheme in order to be convicted, Ryan's Rule 29 Mot. at 9, that argument was foreclosed, as this court held prior to trial, by the Seventh Circuit's decision in *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005); *United States v. Warner*, No. 02 CR 506, 2005 WL

2367769, at *2 (N.D. Ill Sept. 23, 2005). The *Spano* court observed, "A participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants . . . . In the case of a successful scheme, the public is deprived of its servants' honest services no matter who receives the proceeds." *Spano*, 421 F.3d at 603. The series of checks mentioned above and introduced into evidence demonstrate that even if the government did not prove that Ryan benefitted from the charged scheme, Warner, Udstuen, Swanson, and Klein benefitted in the form of lobbying and rental fees. Similarly, the court is not persuaded to revisit its determination that the government was not required to prove a strict *quid pro quo*—a particular payment or benefit for a specific official act. *Warner*, 2005 WL 2367769, at *4. What the government was required to show, however, was that Ryan "accepted gifts or other consideration with the understanding that he would perform or not perform acts in his official capacity in return." *Id.*

The government introduced a great deal of evidence of Ryan's acceptance of gifts and benefits. Gov't Resp. at 10–11. For example, Warner provided favorable construction and insurance benefits to members of Ryan's family, Gov. Ex. 08-056, Tr. at 17090 (Fairman); invested in Ryan's son's business, Gov. Ex. 08-087, 08-088; and provided favorable financial treatment to Comguard, a company associated with Ryan's brother. Gov. Ex. 09-001, 09-002; *see* Gov't Resp. at 14–15. Ron Swanson paid for Disney World accommodations for Ryan's daughter, Gov. Ex. 28- 009, and gave the Ryans numerous gifts, Gov. Ex. 16-040, 16-045, 16-029. While there was no evidence of Ryan directly accepting cash, there was

evidence that Ryan gambled regularly and carried substantial amounts of cash, despite having withdrawn comparatively little from his bank accounts from 1993 to 2002. *See* Tr. at 15279 (McAvoy), Tr. at 7844, 7860 (Borisy); Tr. at 2979 (Fawell); Gov. Ex. 16-089, 33-501.

Ryan argues that the evidence was insufficient to prove that he had the requisite intent to violate the mail fraud statute. Specifically, Ryan contends that he was not aware of, or otherwise involved in, "many of the alleged suspect transactions." Ryan Rule 29 Mot. at 9–16. The court will address each of the mail fraud counts in turn.

A. The Evidence Was Sufficient to Support the Jury's Verdict on Count Two

Count Two of the Indictment charged Ryan and Warner with mail fraud in connection with a contract awarded to ADM by the Secretary of State's office. The SOS office sometimes contracted with outside vendors for products and services. Tr. at 8032 (Covert). Vehicle registration stickers, which help law enforcement determine whether drivers are driving with valid license plates, are one such product. *Id.* at 8033. Each department within the SOS office was responsible for establishing contract specifications that vendors were required to meet in order to be awarded a contract to provide services to the State. *Id.* at 8034. James Covert, the director of the SOS Office's vehicle-services department during Ryan's tenure as SOS, testified that the department had established procedures for determining contract specifications and awarding contracts. *Id.* at 8035–36. In early 1991, Covert had a meeting with Larry Warner in which Warner informed Covert that he

had "authority to speak for Secretary Ryan." *Id.* at 8053. At this same meeting, Warner told Covert that the SOS Office should "continue doing business with American Decal," a company that produced validation stickers and was one of Warner's lobbying clients. *Id.* Warner further asked Covert not to do business with an American Decal competitor, 3-M. *Id.* at 8054. Thereafter, Warner and Covert had weekly meetings, and, Covert testified, he generally did what Warner asked him to do. *Id.* at 8056, 8060.

As American Decal already had the vehicle services contract, it necessarily satisfied the existing contract specifications. Other companies, however, had difficulty satisfying those requirements. *Id.* at 8064. The issue came to a head in 1993, when Mr. Covert learned that a number of companies claimed to be capable of manufacturing superior products that did not comply with contract specifications at that time. *Id.* at 8119. Covert and another SOS employee convened a committee to review the specifications, and the committee recommended changing the specifications in a way that would have opened the contract for other bidders. *Id.* at 8120, 8126, 8135–36. Mr. Covert agreed to implement the changes, but soon afterwards, he received an angry call from Warner, in which Warner claimed that Covert was going to put him out of business and that Warner would "take care of it." *Id.* at 8140, 8144. The next day, Covert received a stern call from then-Secretary Ryan in which Ryan told Covert to withdraw the changed specifications "without drawing a lot of attention to it." *Id.* at 8145. Covert complied with this direction despite his belief that the changes to the specifications were in the State's best interests. *Id.* at 8146.

At trial, Ryan pointed that ADM's contract with the SOS Office was entered into before Ryan became SOS, and that there were sound law-enforcement rationales for keeping the contract specifications as they were. As the government contended, however, though the contract did not originate during Ryan's tenure as SOS, his actions ensured that the contract would remain in place, to Warner's benefit. Moreover, the jury was entitled to reject the defense's theory that Ryan was motivated by law-enforcement interests and not his own interests and those of his friends in making his decision regarding the sticker contract specifications. Ryan's direct intervention on Warner's behalf, and his attempt to conceal his intervention by directing Covert to withdraw the specifications quietly, amply support the jury's verdict with respect to Count Two.

Warner also challenges Count Two on the grounds that the mailing identified in the indictment and introduced at trial was not in furtherance of the license plate registration sticker/ADM lobbying contract scheme. Warner Post-Trial Mot. at 24–25. Warner notes that this mailing occurred in 2000, but that the evidence at trial demonstrated that his association with ADM had ended several years prior. A mailing is considered in furtherance of a scheme to defraud even where it is incidental to an essential part of the scheme. *United States v. Fernandez*, 282 F.3d 500, 508 (7th Cir. 2002); see also *United States v. Koen*, 982 F.2d 1101, 1107 (7th Cir. 1992) (reading "in furtherance" broadly). Aristoteles Mpougas testified that the 2000 payment related to a one-year 1998 contract for license plate registration stickers with the Secretary of State's Office entered into while Ryan still held that office. A dispute arose concerning

payments on that contract and the State of Illinois only paid American Decal for the shipment of stickers related to this contract when the dispute was resolved in 2000. As the government notes, the indictment specifically refers to payments from the Secretary of State's Office to ADM from 1991 until 2000. (Indict., Count II, ¶ 23). Payment on a contract Warner originally used his influence and access to Ryan to help secure was an essential part of the scheme. Gov't Resp. at 32. The 2000 mailing was thus in furtherance of the scheme.

B. The Evidence Was Sufficient to Support the Jury's Verdict on Count Three

Count Three of the Indictment charged Ryan and Warner with mail fraud in connection with the lease of an SOS facility in Joliet. In late 1994, SOS considered finding a new location for driver and administration facilities it leased in Hinsdale. Tr. at 2802-03 (Fawell); Tr. at 10462 (Sherman). At that time, Leonard Sherman was director of the department of administrative hearings for SOS. Tr. at 10452 (Sherman). Scott Fawell testified that in the course of multiple conversations about finding an alternative location to the Hinsdale site, Defendant Ryan told Fawell he (Ryan) had "hooked up" Sherman with Defendant Warner. Tr. at 2804–05 (Fawell). For his part, Sherman testified that Ryan called him and said he had heard that Sherman was looking for a new site, and that Sherman should contact Warner for help finding a site. Tr. at 10463 (Sherman). Todd Borisy, a member of Ryan's security detail, overheard Ryan and Warner talking about Warner buying property in Joliet. Tr. at 7822–24 (Borisy). After Sherman and Warner inspected a building in Joliet, SOS leased and moved into that

building in January 1995. Tr. at 10471, 10479 (Sherman). The owner of record on the lease was an LLC, Tr. at 10484 (Sherman), but Warner was the true owner, having bought the property in October 1994. In short, the government alleged, Warner bought the Joliet building and concealed his ownership interest, while Ryan steered Sherman into locating the SOS offices there.

Defendant Ryan asks for a judgment of acquittal on all the mail fraud courts, but he has not specifically addressed the sufficiency of the government's evidence as to the Joliet lease; rather, Ryan generally argues that "with regard to many of the alleged suspect transactions, Ryan had no involvement." Ryan Rule 29 Mot. at 9. If this is the extent of his attack on the sufficiency of the evidence on Count Three, it necessarily fails. As noted above, Fawell, Sherman, and Borisy all testified as to Ryan's (and Warner's) direct involvement. Ryan put Sherman in contact with Warner to look for a new site, and the jury could reasonably infer from Borisy's testimony that Ryan knew Warner owned the Joliet building at the time. The evidence supports the jury's verdict on Count Three.

C. The Evidence Was Sufficient to Support the Jury's Verdict on Count Four

Count Four of the Indictment charged Ryan and Warner with mail fraud in connection with contracts awarded to IBM, another Warner lobbying client, by the SOS Office. As of early 1991, Honeywell/Bull ("Honeywell") held the existing mainframe computer system contract with the SOS Office. Tr. at 11665 (Udstuen); Tr. at 12532 (Cavallaro). The SOS Office was, however, seeking to upgrade its computer

system, Tr. at 11665 (Udstuen), and both Honeywell and IBM were interested in obtaining the contract for that upgrade. Tr. at 5850 (Cook). Warner and Udstuen learned about the SOS Office's intentions, Tr. at 122245–46, and attempted to profit from that knowledge, and from their relationship with Ryan, by arranging a deal with Honeywell: in exchange for a large sum of money (the precise amount was disputed) or a percentage of the contract, Warner and Udstuen would see to it that Honeywell received the prospective mainframe upgrade contract. Tr. at 5548–49, 5552–53 (Wuttke); Tr. at 5876–77 (Cook). Warner and Udstuen later retracted their offer, saying that it would be a conflict of interest, but suggested that Honeywell retain Ron Swanson. Tr. at 5557 (Wuttke). Swanson offered to secure the contract for Honeywell in exchange for $750,000, an offer that Honeywell rejected. Tr. at 5561.

Robert Cook, Honeywell's lobbyist at that time, told Ryan about the episode with Warner and Udstuen in a meeting on September 24, 1991. Tr. at 5875–5890 at (Cook); Gov. Ex. 04-003. Although Cook's account differed in some respects from Wuttke's recollection, in both accounts Warner and Udstuen promised to deliver Honeywell the mainframe upgrade contract. Ryan acknowledged that Warner and Udstuen were his advisors, stated that he did not approve of what they had done, and assured Cook he would "get to the bottom of it." *Id.* at 5886. When Ryan contacted Cook the next day, however, he simply told Cook that Udstuen had a different recollection of the meeting with Honeywell and that, as far Ryan was concerned, the matter was "settled." *Id.* at 5889.

Despite being aware of Warner's and Udstuen's scheme to shakedown Honeywell, Ryan authorized Warner and Udstuen to assist in the process of hiring a new Director of the Information Services Department in late 1991. Tr. at 12526 (Cavallaro). Among the Director's responsibilities was assisting in the selection of the mainframe computer upgrade contract. *Id.* at 12532. Warner and Udstuen interviewed a candidate for the Director position, Frank Cavallaro, and ascertained that Cavallaro would be supportive of selecting IBM for the mainframe computer upgrade contract. Tr. at 12528–29 (Cavallaro). Warner and Udstuen recommended Cavallaro to Ryan, who then hired Cavallaro as Director of Information Services. Over time, Cavallaro, believing that Warner was acting with Ryan's authority, performed official actions that benefitted Warner. *Id.* at 12557 (testifying that he temporarily "held up" IBM projects at Warner's request because Warner was Secretary Ryan's "[g]ood friend."). Around this same time in early 1991, an IBM representative approached Udstuen for a lobbyist referral, as IBM was interested in doing business with the SOS Office. Tr. at 11642–45. Udstuen referred IBM to Warner. *Id.*

In approximately March 1993, Warner entered into a written contract with IBM, retroactive for services beginning in July 1, 1992, and under which IBM agreed to pay Warner a percentage of all revenues, up to $1 million, that were received in connection with SOS contracts. Although this deal was very lucrative for Warner, Mr. Cavallaro testified that he was not aware that Warner did anything to lobby the SOS Office. Indeed, the government put into evidence a letter from Warner to IBM from

August 1993 in which Warner discusses the mainframe contract as if it had been a foregone conclusion, and the basis for lobbying payments under the contract, two years before Ryan formally awarded the mainframe computer upgrade contract to IBM. Tr. at 11666 (Udstuen); Gov. Ex. 04-021.

At trial, Ryan argued that IBM was the most suitable company to replace the mainframe computer, and that Ryan acted according to what his advisors recommended. The government did not dispute IBM's merits, or its suitability for the mainframe project. The issue, according to the government, was whether Warner was permitted to profit from IBM with Ryan's tacit approval. The jury could have reasonably concluded that Warner's IBM proceeds were a direct result of the access that to the SOS Office that Ryan gave Warner. When Ryan learned that Udstuen and Warner had attempted to shakedown Honeywell, Ryan excused their conduct and then gave them even greater access to the SOS Office. Ryan authorized Udstuen and Warner to select Cavallaro as the Director of the Information Services Department after ascertaining Cavallaro's preference for IBM. Having affixed a pro-IBM employee in a key SOS position, Warner parlayed his knowledge of the SOS Office's intentions into a profitable deal with IBM. Udstuen, in turn, benefitted through an arrangement with Warner whereby Udstuen received a portion of the money that Warner received from ADM and IBM. According to Udstuen, Ryan blessed this arrangement. The evidence supports Count Four.

D. The Evidence Was Sufficient to Support the Jury's Verdict on Count Five

Count Five of the Indictment charged Ryan and Warner with mail fraud in connection with Warner's money-laundering arrangement with Udstuen and co-schemer Alan Drazek. As discussed in more detail *infra*, Warner arranged, with Ryan's blessing, for Udstuen to receive one third of the proceeds arising from Warner's lobbying arrangements with ADM and IBM. These same contracts, as previously discussed, were attributable to Warner's relationship with Ryan and the access to the SOS Office that this relationship afforded. As charged in this count, Warner caused a check to be written on an account controlled by his company, Omega Consulting Group. Warner deposited the proceeds of his IBM lobbying arrangement into Omega's account. The Omega check was then made out to American Management Resources ("AMR"), a company controlled by co-schemer Alan Drazek. Warner caused the Omega/AMR checks to be sent to Udstuen, who would, in turn, send the checks to Drazek. Drazek cashed the checks, keeping a portion for his troubles and delivering the balance, in cash, to Udstuen. This arrangement served no purpose other than to disguise the provenance of the proceeds. Viewing the evidence in the light most favorable to the government, the court concludes that the jury could have reasonably concluded that the flow of State benefits to Ryan's associates, and the effort to conceal that flow, support the conclusion that the Defendants acted with the requisite fraudulent intent.

E. The Evidence Was Sufficient to Support the Jury's Verdict on Count Six

Count Six of the Indictment charged Ryan and Warner with mail fraud in connection with the lease of a building in South Holland, Illinois. In early 1997, Ryan proposed leasing from his friend Harry Klein a building that Klein owned in South Holland, Illinois. Tr. at 9475 (Klein). Klein expressed interest, and Ryan told Mike Chamness, Director of Drivers' Services, to contact Klein. Tr. at 6636 (Chamness). During his phone conversation with Chamness, Ryan told Chamness that he (Ryan) wanted to tell Klein personally when there was a deal. *Id.* at 6636. An SOS employee, James Esslinger, was dispatched to inspect the property and determine whether it was suitable as a commercial-drivers-license ("CDL") facility. Tr. at 6266 (Esslinger). Esslinger, the head of the SOS's property management division, in fact concluded that the building was not ideally suited for a CDL facility, but it was the only site that the property-management division considered because, he testified, it was the only property that were told to consider. *Id.* at 6263, 6266–67. Esslinger further testified that he was directed by his superior, Mr. Chamness, to prepare an inaccurately favorable assessment of the property. The contract was executed with little negotiation, and on terms that were very favorable to Klein. Tr. at 9488 (Klein); Tr. at 6280–82 (Esslinger). Indeed, Chamness, who had already received an angry phone call from Ryan after he mistakenly concluded that Chamness had told Klein that the deal was done, decided that the best course was to defer to his superiors on any remaining deal points. Tr. at 6654–65. With respect to two such issues, the contract's termination clause and the

timing of "build-out" payments to Klein, Ryan told Chamness to do what Klein wanted. Tr. at 6660–64 (Chamness). The lease was not signed by "autopen," as was often the case with such contracts, but instead by Ryan in his own hand. Tr. at 6289–91 (Esslinger).

There was ample evidence in the record to support the government's position that this lease was foisted on SOS staff because Ryan wanted to do his friend a favor. Ryan's personal intervention on Klein's behalf initiated the transaction, and Ryan remained involved thereafter. Ryan maintains that Chamness and Esslinger "recommended" the lease, Ryan Post-Trial Mot. at 14, but it is clear from their testimony that they were doing nothing more than acquiescing in the decision made by Ryan. In the end, the State was saddled with a property that was, in the estimation of at least two SOS employees, suboptimal from the standpoint of price and suitability.

F. The Evidence Was Sufficient to Support the Jury's Verdict on Count Seven

In Count Seven, the government charged both Defendants with mail fraud in connection with a $18,902.79 from Viisage Technologies to National Consulting Company, a firm controlled by Warner. Viisage was the successful bidder on a contract to provide technology that would enable the SOS to switch from drivers' licenses produced with film to digital drivers' licenses, which use digital images capable of being stored in the SOS computer system. In fact, Viisage was originally the only bidder in response to the request for proposal ("RFP") issued by SOS; the office declined to accept that bid and instead reissued the RFP in an effort to generate more competition. Viisage bid again on the project; its

proposal to provide the technology for $1.113 per card was significantly lower than the proposal made by the only other bidder, Unisys. Michael Chamness, the Director of Driver's Services, testified that Viisage was the best choice for the contract, and the government has not argued that the choice of Viisage was inappropriate. *See* Tr. At 6813–14 (Chamness).

Instead, the evidence establishes that Defendant Warner, who attended an SOS meeting in 1995 where the concept of digital licensing was first proposed, was able to use his access to that information for personal gain. He initially solicited the vendor that provided film licenses, but that vendor declined to pay Warner, who was not at time a registered lobbyist, his requested "lobbying" fee. Soon after an August 1, 1996 meeting at which Viisage and Unisys made presentations to SOS officials, including Ryan and Fawell, Warner telephoned Chamness and learned that Chamness viewed Viisage as the likely vendor. Three weeks later, Warner met with a Viisage vice president and offered to help Viisage win the contract in exchange for a 5% commission on Viisage's revenues. A few weeks after that, Viisage signed a lobbying agreement that made no mention of Warner himself, and Warner never registered as a lobbyist for Viisage.

Fawell testified that he discussed Warner's role as Viisage's lobbyist with Ryan. In addition, the government presented evidence that, some time in 1996, Ryan met with a Unisys lobbyist and communicated to Unisys through him that Unisys was "on the wrong horse" in working with its co-venturer, NBS, on the digital licensing proposal. At Ryan's suggestion, a Unisys official spoke to Warner; Warner arranged a conference call with the Unisys

official and a Viisage representative in an unsuccessful effort to establish a joint venture between Unisys and Viisage.

Even before the contract was awarded, Warner was confident enough that Viisage would win it that he guaranteed Ryan friend Ron Swanson a $36,000 share of the lobbying fee. Warner and his friend Larry Stern purchased shares of Viisage prior to the announcement that Viisage had won the state contract. After the contract award was publicly announced, Viisage's registered lobbyist signed an agreement assigning its rights under the lobbying contract to National Consulting Company, a firm controlled by Warner.

From this evidence, the jury could reasonably have found that, by virtue of his relationship with Ryan, Warner obtained access to information about the digital licensing contract and secured a share of the profits for himself, and that Warner attempted to conceal his role. The fact that Warner's call to Chamness occurred soon after the August 1, 1996 Viisage presentation; Fawell's testimony that he discussed Warner's role with Ryan; and Ryan's communications with Unisys, all support the finding that Ryan knew of and blessed the arrangement. The evidence supports the jury's verdict on Count Seven.

G. The Evidence Was Sufficient to Support the Jury's Verdict on Count Eight

Count Eight of the Indictment charged Ryan and Warner with mail fraud in connection with a building that Warner leased to the SOS Office in Bellwood, Illinois. In 1992, Warner learned that the SOS Office was seeking office space for the SOS Department of Police. Tr. at 2772 (Fawell). In discussing the

possibility of leasing a building owned by Warner to the SOS Office, Fawell told Warner that he (Fawell) was concerned about possible political ramifications for Ryan if the press discovered Warner's interest in the property. Tr. at 2773 (Fawell). Warner assured Fawell, in Ryan's presence, that no one would discover his interest because he was "buried in the paperwork." *Id.* at 2774, 3010. Several days later, Ryan directed Fawell to put Warner in touch with Alex Nelson, the Director of Physical Services. *Id.* at 2777, 5106. Mr. Nelson testified that Warner told him that "[w]e found a place for the cops," and he gave Nelson the name and number of a real estate company to call. Tr. at 10163 (Nelson). Fifteen minutes later, Nelson received a call from Ryan informing him about a property in Bellwood and giving Nelson the name and number of the same real estate company. *Id.* at 10164. Nelson inspected the property, found it suitable, and a lease was executed. *Id.* at 10167. The executed lease does not disclose Warner's interest in the property, Tr. at 3010 (Fawell), nor was Nelson aware that Warner owned the property at that time. Tr. at 10167–68 (Nelson). When Ryan was interviewed by the FBI about this lease, he stated that he did not know that Warner had an interest in the Bellwood property. Tr. at 8157 (Ruebenson).

At trial, Ryan argued that the lease had been vetted by his subordinates and found suitable. But there was sufficient evidence from which the jury could have concluded that Ryan steered the lease to Warner, in a top-down fashion, and that the approval of his subordinate was a mere formality. Moreover, the layers of deception surrounding the transaction

support the jury's finding that the Defendants acted with the requisite intent.

H. The Evidence Was Insufficient to Support the Jury's Verdict on Count Nine

Count Nine of the Indictment charged Ryan and Warner with mail fraud in connection with a commission contract that Warner executed relating to property at 17 North State Street. The Indictment describes an incident in mid-1991 in which Warner directs an SOS Official ("SOS Official F") to contact the owner of the building at 17 North State, in which Warner has a non-disclosed financial interest. Indict., ¶ 73. Warner and Ryan then cause the SOS Office to execute a six-year lease of the building, and Warner profits handsomely. *Id.* But the evidence of this incident, which would have made this sequence analogous to South Holland and other schemes, did not materialize. In closing argument, the government argued that Warner, by virtue of his position as a member of Ryan's transition team, learned that the SOS Office was seeking to relocate certain facilities then located at 188 W. Randolph Street in Chicago. Tr. at 10151, 10154 (Nelson). What this evidence does not show is that Warner was privy to, and acted upon, information that was not publicly available. Warner did execute a leasing agency agreement with the property's owner pursuant to which he received a 6% commission when the SOS office executed a lease there. Gov. Ex. 05-005. But unlike South Holland and Joliet, there is no evidence that Ryan steered this contract to Warner. The government also asserted in closing argument that the lease was in the name of one of Warner's companies, National Consulting Company ("NCC"), and executed by an individual, Adolph Ottaviani, who was not affiliated with NCC.

But absent evidence that Warner obtained the contract improperly, the court his hard-pressed to distinguish this contract from any other in which the real party in interest is acting through an agent. The court concludes that the evidence was insufficient for the jury to conclude beyond a reasonable doubt that either defendant acted with the requisite intent. The court therefore grants the Defendants' motions for a judgment of acquittal on Count Nine.

I. The Evidence Was Insufficient to Support the Jury's Verdict on Count Ten

Count Ten of the Indictment charged Ryan alone with mail fraud in connection with the Governor's Office's selection of Grayville, Illinois for a maximum security prison. Around January 2001, the Illinois Department of Corrections ("IDOC") announced that three locations had been selected as finalists for the site of the prison. Tr. at 13599–600 (Bettenhausen). At a meeting involving high-ranking officials from the Governor's Office and the IDOC, Defendant Ryan selected Grayville as the prison site, though the participants at the meeting agreed that the decision would not be made public at that time. Tr. at 13602–04. Immediately after the meeting, however, Ryan did in fact leak this confidential information to his friend Ron Swanson in the presence of Matthew Bettenhausen, who was present at the meeting in his capacity as deputy governor for criminal justice and public safety. *Id.* at 13598, 13604. Mr. Bettenhausen testified that after the meeting broke up, Ryan bumped into Swanson in the receiving area outside the then-Governor Ryan's office. *Id.* at 13604. Indeed, Swanson spent a lot of time in and around the Governor's office. *See, e.g., id.* at 13661–62; 13829–30, 13832 (Wright). According to Bettenhausen, when

Ryan told Swanson that Grayville had been selected, Bettenhausen interjected that the information was confidential. Swanson stated that he understood, but asked to be present at the public announcement of Grayville's selection. Ryan directed Bettenhausen to see to it that he (Swanson) was notified. *Id.* at 13605–06.

Soon after the meeting at which Grayville was selected as the site for the new prison, Swanson marketed his services as a lobbyist to a business association affiliated with Grayville. The Grayville association entered into an agreement pursuant to which Swanson would lobby for the selection of Grayville as the site for the proposed prison in exchange for a lobbying fee of $50,000. Tr. at 14028 (Williams). (The $50,000 cashiers check that Swanson received from this business association is the mailing charged in Count Ten). After accepting the money, Swanson falsely assured his primary liaison with the business association, Dr. Clyde Wilson, and others affiliated with the group, that he was actively lobbying on their behalf. *Id.* at 14040. Of course, he was doing no such thing. On the morning that Ryan was to make the official announcement of the selection of Grayville, Bettenhausen again ran into Swanson in the Governor's offices, and Swanson asked Bettenhausen to deliver a message to Ryan. Tr. at 13615 (Bettenhausen). Swanson asked that, in his public announcement, Ryan thank Dr. Wilson particularly as a supporter of Grayville's efforts to obtain the prison. *Id.* At a public ceremony in Grayville on April 12, 2001, Ryan formally announced his selection of Grayville and did thank Dr. Wilson as Swanson had requested. *Id.* at 13616.

The government stipulated that the process by which Grayville was selected was not influenced by Swanson or anyone else, Tr. at 13646–47 (Bettenhausen), and the merits of the choice of Grayville as a prison site are undisputed. Ryan contends that in disclosing that choice to Swanson, he acted negligently at worst. Ryan Rule 29 Mot. at 15. Bettenhausen testified that, from his perspective, Ryan bumped into Swanson by chance after the meeting about Grayville. Tr. at 13651 (Bettenhausen). The information was conveyed to Swanson in the presence of others, and Bettenhausen told Swanson, in Ryan's presence, that the information was to remain confidential. No witness testified that Ryan was aware that Swanson had entered into the sham lobbying contract, or put into evidence circumstances from which the jury could infer such awareness.

In support of Ryan's conviction on this count, the government relies chiefly on Ryan's disclosure of material, confidential information to his good friend within minutes of Grayville's selection. *Id.* at 13667. This, according to the government, proves that the disclosure was not inadvertent. The government also relies on the fact that Ryan acceded to Swanson's request, communicated to him by Bettenhausen on the trip down to Grayville, to thank Dr. Wilson. Even viewing this evidence in the light most favorable to the verdict, however, the court is not satisfied that these circumstances establish Ryan's guilt in connection with the Grayville lobbying contract. Although Ryan should not have disclosed confidential information to his friend, he heard Matthew Bettenhausen warn Swanson that the selection of Grayville was confidential. Perhaps Ryan could infer

from Swanson's request that he publicly acknowledge Dr. Wilson that Swanson had pretended to have influenced the Grayville choice; but the court is unwilling to sustain a conviction by "piling inference upon inference." *United States v. Harris*, 942 F.2d 1125, 1129 (7th Cir. 1991) (citation and internal quotation marks omitted). The fact that a short time elapsed between the end of the meeting and Ryan's disclosing the information to Swanson is equally consistent with the inference that the disclosure was inadvertent as it is with the inference that it was purposeful. *Id.* at 1129–30 ("[W]here the evidence as to an element of a crime is equally consistent with a theory of innocence as a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt.") (quoting *United States v. Delay*, 440 F.2d 566, 568 (7th Cir. 1971)). And while Swanson's request to thank Dr. Wilson might appear unusual, Ryan was not in a position to clarify the matter on his way down to the Grayville ceremony with Bettenhausen. The court concludes that the evidence was insufficient to support Defendant Ryan's conviction on Count Ten.

J. The Evidence at Trial Demonstrated a Single Scheme to Defraud

Ryan and Warner challenge their mail fraud convictions on the ground that while the Indictment set out a single scheme to defraud, the government's evidence at trial established disconnected schemes, and this variance prejudiced the defense. Ryan points to three aspects of the purported scheme: (1) the Secretary of State's Office's leases of Warner's property; (2) the termination of the Inspector General's investigation; and (3) Ryan's leak of confidential information about the placement of the

prison in Grayville. According to Ryan, "[t]hese allegations alone concern schemes of three very different natures. The evidence showed *different* participants, acting at *different* times, on different matters. The government failed to prove the interrelationship between these separate schemes necessary to prove a unitary scheme to defraud." Ryan's Post-Trial Mot. at 66. Warner sets out a laundry list of evidence admitted against Ryan alone in his renewed motion for severance as evidence of a prejudicial variance. Warner's Rule 29 Mot. at 2-4. The government characterizes the Defendants' challenge as an argument that the concept of a single scheme is irreconcilable with the notion that Ryan held two separate offices, that of the Secretary of State and Governor. Gov't. Resp. at 28.

Defendants' "variance" argument, too, is a challenge to the sufficiency of the evidence. *See United States v. Townsend*, 924 F.2d 1385, 1389 (7th Cir.1991) ("a conspiracy variance claim amounts to a challenge to the sufficiency of the evidence supporting the jury's finding that each defendant was a member of the same conspiracy.") Where a defendant asserts a variance claim, a reviewing court reviews the evidence in the light most favorable to the government. *United States v. Wilson*, 134 F.3d 855, 865 (7th Cir. 1998). The fact that the evidence introduced at trial might also be consistent with an alternate theory is irrelevant. *Townsend*, 924 F.2d at 1389. Thus, "[e]ven if the evidence arguably establishe[s] multiple conspiracies, there is no material variance from an indictment charging a single conspiracy if a reasonable trier of fact could have found beyond a reasonable doubt the existence of the single conspiracy charged in the indictment."

United States v. Williams, 272 F.3d 845, 862 (7th Cir. 2001) (citations omitted).[1] Furthermore, a defendant must show prejudice from the variance. *United States v. Hewlett*, 453 F.3d 876, 879 (7th Cir. 2006).

Ryan argues that the government offered "no proof of a unitary agreement to act through a single enterprise pursuant to an overall objective," in part because the alleged conspiracies at the SOS and the governor's office were "wholly distinct." Ryan Post-Trial Mot. at 65. As discussed, the court is not persuaded by Ryan's characterization of the two Illinois offices as such separate and distinct enterprises that no conspiracy could carry over from one to the other; indeed, several of the schemes alleged in the indictment spanned Ryan's occupancy in both positions. *See supra* I.B. Moreover, Ryan's assertion that the government must show proof of a "unitary agreement" is incorrect, for the element of agreement, while necessary for a conspiracy offense, is not a prerequisite to a conviction for mail fraud. *See United States v. Adeniji*, 221 F.3d 1020, 1026 (7th Cir. 2000). Ryan's variance claim will thus be defeated if the jury could reasonably have found the existence of a scheme with a common unifying objective. In *United States v. Polichemi*, for example, the Seventh Circuit rejected the defendants' variance argument in finding a single wire fraud scheme in a plan to market phony financial instruments to investors. 219 F.3d 698, 706 (7th Cir. 2000). The defendants defrauded about 30 different investors, in

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[1] Courts have found that many of the principles governing variance in conspiracy cases apply to multi-defendant mail fraud prosecutions as well. *See United States v. Horton*, 847 F.2d 313, 317 (6th Cir. 1988); *United States v. Camiel*, 689 F.2d 31, 35 (3d Cir. 1982).

factually different transactions, and the same people did not participate in every "subscheme." *Id.* Nonetheless, the court, noting the defendants' "common design and purpose to defraud investors," concluded that the jury could have found a single scheme despite the fact that each defendant's role varied somewhat from transaction to transaction. *Id.*; *cf. United States v. Camiel*, 689 F.2d 31, 36-37 (3d Cir. 1982) (holding that the jury could not have found a single unified scheme where the indictment charged a single ghost payroll scheme among Democratic Party loyalists, but where the evidence showed at least two warring factions in the Party).

The government notes that the nature of the scheme was that Ryan would give his co-schemers access to nonpublic information and government decisionmaking from which the co-schemers could secure lucrative lobbying contracts and leases in exchange for benefits directed by the co-schemers to Ryan and third parties close to Ryan. Gov't Resp. at 29. The government also notes that sequences that do not immediately fit this pattern often played the role of protecting the aforementioned arrangements. *Id.* at 29. Thus, in order for Ryan and his cronies to continue turning confidential information into lucrative contracts and leases, the IG office had be dismantled, Ryan as Governor had to cover his misdeeds as Secretary of State with false statements to the FBI and IRS, and Warner had to avoid filing as a lobbyist for Viisage. Although Ryan is correct to say that these sequences took place at different times and often involved different people, the jury could have reasonably concluded all are directed toward the fraud scheme or toward efforts to conceal that scheme and prevent its discovery.

Finally, while Warner was not involved in every transaction—he was not part of the South Holland lease, for example—this fact alone does not establish a variance. Warner's lack of participation in any individual episode does not necessarily negate the existence of a single scheme. *United States v. Lanas*, 324 F.3d 894, 899 (7th Cir. 2003); *Polichemi*, 219 F.3d at 706 (finding a single scheme despite the fact that one defendant did not even meet the others until the scheme was well underway).

K. The Court is Not Persuaded by Defendants' Constitutional Challenges

Both Defendants raise constitutional arguments as well. Ryan argues somewhat summarily that the mail fraud charges are vague because the United States Code does not define the phrase "intangible right to honest services." Ryan Rule 29 Mot. at 16–17. Thus, contends Ryan, there is "confusion" over what kind of conduct is prohibited. *Id.* at 17. Ryan cites this court's statement in *United States v. Fawell*, No. 02 CR 310, 2003 WL 21544239, at *3 (N.D. Ill. July 9, 2003) that "'the line should have been clear to Mr. Fawell when he crossed it' by diverting state resources for personal and political use," arguing that the line was not clear for Ryan. Ryan Rule 29 Mot. at 17. The court is not persuaded. First, although the term "intangible right to honest services" may not be defined by statute, the term has been addressed by the courts, both before and after section 1346 was enacted in 1988. *See, e.g.*, *United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998) ("An employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain."); *United States v. Isaacs*, 493 F.2d 1124, 1150 (7th Cir. 1974) (upholding the

conviction of an Illinois governor for defrauding the citizens of Illinois of his "honest and faithful services"). Second, the evidence at trial established that both Defendants[2] took great pains to conceal their activities. Ryan lied to the IRS and FBI. Warner structured his behavior, buried his name in leases, and omitted his name entirely from lobbying forms. These actions provide a strong inference that the Defendants were aware of the boundary between legal and illegal conduct.

More serious is Warner's argument that the court erred in citing state law while instructing the jury on mail fraud. Warner's Post-Trial Mot. at 22. The court instructed the jury that the "scheme to defraud" element of section 1341 could be defined as a scheme to "deprive the people of the State of Illinois of their intangible right to the honest services of their public officials or employees." Final Jury Instr. at 76; *see* 18 U.S.C. § 1346 ("'scheme or artifice to defraud'" includes a scheme or artifice to deprive another of the intangible right of honest services."). The court then referred to provisions of the Illinois Constitution and Illinois statutes that were applicable to state officials during the relevant time. Final Jury Instr. at 88. Both before and after these references to Illinois law, the court instructed the jury that "[n]ot every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation." *Id.* at 88, 93.

In his post-trial motion, Defendant Warner argues that the court's references to Illinois law were

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[2] Warner generally "assail[s] the application and constitutionality of the mail fraud statute to this case," and joins Ryan's arguments on the issue. Warner Post-Trial Mot. at 22.

improper because they allowed the jury to convict on federal mail fraud, RICO, and money laundering charges based on the jury's determination that Defendants violated state law.[3] Warner Post-Trial Mot. at 22-23. This appears to be an extension of his argument at the close of the government's case that state law cannot provide a foundation for an "honest services" mail fraud charge. Warner Rule 29 Mot. at 6. The court declines to decide the extent to which a federal mail fraud conviction can be based on state law violations because, in the court's opinion, the jury instructions sufficiently precluded the possibility that the jury returned federal convictions based on violation of Illinois law.

As a preliminary matter, the court acknowledges that Warner's argument applies to both defendants,

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[3] Although Warner makes his argument as to all three offenses, his argument is clearly without merit as to the RICO and money laundering convictions. The court made no reference to Illinois law in its instructions for the money laundering count, and in any event, the federal money laundering statute on its face allows conviction based on a defendant's violation of state law. See 18 U.S.C. § 1956(a)(1)(B)(ii) (proscribing the avoidance of a transaction reporting requirement under either state or federal law). As for RICO, a defendant's violation of state law can constitute a predicate act of racketeering activity. See 18 U.S.C. § 1961(1) (defining "racketeering activity" as certain crimes, including bribery, which are "chargeable under State law and punishable by imprisonment for more than one year."). Thus, the court only addresses Warner's argument as to the mail fraud offense.

Defendant Ryan does not raise this argument in his post-trial motion, but joined in the argument during the jury instructions conference. Tr. at 22088 (02/28/06). The government does not appear to have responded to this argument.

even though Warner was not a public official.[4] The court instructed the jury that the government did not allege that Warner was a public official, and that only Ryan owed a duty of honest services to the people of Illinois. Final Jury Instr. at 82-83. But the court also instructed the jury that only one participant in a scheme need be a public official. *Id.* at 79. Thus, although the court referred to Illinois law in the context of Ryan's duty of honest services, Warner was implicated as an alleged participant in a scheme with Ryan.

Warner, citing *Bloom*, 149 F.3d 649, and *United States v. Martin*, 195 F.3d 961 (7th Cir. 1999), argues that "the Seventh Circuit has rejected the proposition that State law may provide a foundation for an 'honest services' mail fraud charge." Defendant Warner's Motion For Judgment Of Acquittal And Motion To Dismiss Or Strike, at 6. This is incorrect. *Bloom* held that a defendant's breach of fiduciary duty, standing alone and absent misuse of a public position, is insufficient to support an honest services mail fraud charge; rather, the test is whether a public official breaches that duty by misusing his position for personal gain. 149 F.3d at 655-57; *see also Hausmann*, 345 3d at 956 (expressing doubt that an intangible rights theory of mail fraud applies to cases of breach of fiduciary duty "with nothing more," but nonetheless affirming defendant's conviction because he misused his fiduciary relationship, at the expense of the party to whom to the duty was owed, for personal gain). Indeed, the court in *Bloom*

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[4] In response to an earlier indictment of Defendant Warner, this court held that Warner was a private citizen who owed no fiduciary duties to the citizens of Illinois. *United States v. Warner*, 292 F. Supp. 2d 1051, 1063 (N.D. Ill. 2003).

emphasized that the defendant was not charged as a public official, nor with violating state law. 149 F.3d at 654-55. In *Martin*, the Seventh Circuit declined to address whether a fiduciary duty of honest services should be defined by state law or by federal common law because the parties did not properly develop the issue on appeal. 195 F.3d at 967. But the court "for now" declined to impose a requirement that this fiduciary duty *must* be grounded in state law. *Id.* Thus, the Seventh Circuit does not mandate that a fiduciary duty of honest services be defined only by reference to state law; however, the Seventh Circuit does not appear to prohibit any consideration of state law in determining the nature of that duty.

In any event, the court need not decide the issue because in instructing the jury in this case, the court did not tell the jury to determine whether Ryan breached his duty to provide honest services by determining whether Ryan violated Illinois law, or that any violation of an Illinois law related to public service resulted in a per se violation of the duty to provide honest services. The court merely instructed the jury that certain provisions of Illinois law were "applicable" during the relevant time period, and then described these provisions. Final Jury Instr. at 89-92. Before doing so, the court cautioned the jury that not every violation of state law gave rise to a mail fraud violation. *Id.* at 88. The court reiterated this instruction afterwards. *Id.* at 93. Moreover, the court gave a general instruction as to the role of state law in this case: "[I]t is not enough to find that one or both of the defendants violated Illinois law, but instead you must consider Illinois law along with all of the elements of law that I instruct you on. Your job is to decide whether the government has proved,

beyond a reasonable doubt, every element of each particular federal offense you are considering." *Id.* at 32 (emphasis added).

These references to Illinois law were designed to aid the jury in ascertaining the nature and scope of Ryan's duty to provide honest services as an Illinois public official. Indeed, given that Ryan was an Illinois official, with duties defined by Illinois statutes and the Illinois Constitution, it is difficult to imagine how one could conceive of Ryan's duty to provide honest services to the people of Illinois, without any reference to the standards of conduct prescribed by the people of Illinois. The court did not, however, require that the jury find a state law violation in order to find mail fraud. Indeed, after describing the applicable Illinois law, and (again) cautioning that not every state law violation constitutes mail fraud, the court reiterated the test the jury must use in determining whether a public official defrauded the public of honest services: whether the official "misuse[d] his position . . . for private gain for himself or another." Final Jury Instr. at 93. This instruction tracks the Seventh Circuit's holdings in *Bloom and Hausmann*, and in the court's opinion accurately states the law in this circuit.

In his post-trial motion, Warner cites Supreme Court cases holding that state law does not control the definition of federal criminal offenses. Warner Post-Trial Mot. at 23. *See, e.g., Taylor v. United States*, 495 U.S. 575, 590-91 (1990) (holding that the definition of "burglary" in a federal gun law did not depend on state law definitions). The court finds this authority inapplicable here because the court never instructed the jury to adopt any state law definition when considering the mail fraud charges. Warner

also argues that principles of federalism are violated when the mail fraud statute is used to criminalize, on a federal level, conduct traditionally dealt with by state law. Warner Post-Trial Mot. at 23-24. The court is mindful of these federalism concerns, but finds this contention inapplicable to this case as well. The jury did not convict Defendants of using the mails to violate state law; rather, the jury found that Ryan used the mails in breaching his federal duty, created by the mail fraud statute, to provide honest services. The references to Illinois law, as discussed above, merely assisted the jury in determining the nature of that federally-created duty.[5]

Of the remaining cases cited by Warner, the most relevant is *United States v. Sawyer*, 85 F.3d 713, 728 (1st Cir. 1996), which noted that the mail fraud statute does not create a federal felony upon "every transgression of state governmental obligations." The court does not disagree, which is why the court reminded the jury (twice) of that very point. Final Jury Instr. at 88, 93. The court thus concludes that

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[5] The cases Warner cites in support of his federalism argument, while containing sympathetic language, do not specifically address federalism concerns in the "honest services" mail fraud context and thus do not control here. *Cleveland v. United States*, 531 U.S. 12, 20 (2000) was not an intangible rights case, and dealt only with whether a government-issued license is "property" under section 1341. *Kann v. United States*, 323 U.S. 88, 95 (1944), held that mail fraud requires use of the mails as a part of the execution of the fraud, rather than "incidental and collateral" use of the mails. *McNally v. United States*, 483 U.S. 350, 360 (1987) concluded that section 1341 did not support "intangible rights" such as the right to honest services, but Congress reversed that holding by enacting section 1346. *See Bloom*, 149 F.3d at 655.

the references to Illinois law in the mail fraud jury instructions were not improper.

III. The Evidence Was Sufficient to Support the Jury's Verdict on the Tax Counts

Defendant Ryan was convicted of one count of corruptly endeavoring to obstruct the due administration of the federal tax laws in violation of 26 U.S.C. § 7212, and four counts of willfully making false statements in connection with his income tax returns in violation of 26 U.S.C. § 7206(1). See Indict., Counts XVIII–XXII. Ryan contends that the evidence presented at trial was insufficient to support the jury's finding that he willfully filed false tax returns. Ryan Rule 29 at 18.[6] The government was required to prove that "the law imposed a duty on the defendant, that defendant knew of this duty and that he voluntarily and intentionally violated that duty." *United States v. Hilgeford*, 7 F.3d 1340, 1344 (7th Cir. 1993) (quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991)). A defendant's good-faith belief that he is acting within the law, even if objectively unreasonable, negates the willfulness element. *Cheek*, 498 U.S. at 203; see also *United States v. Benson*, 941 F.2d 598, 614 (7th Cir. 1991) ("[T]he reasonableness of a belief is a factor for the jury to consider in determining whether a defendant actually believed and acted on it."). The defendant's intent to violate a known duty under the tax laws may be demonstrated by circumstantial evidence. *United States v. Ytem*, 255 F.3d 394, 396 (7th Cir. 2001).[7]

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[6] Ryan does not specifically challenge the jury's verdict with respect to Count Eighteen (obstructing the IRS).

[7] Accordingly, it is not dispositive that there was no evidence in the record that Ryan told his tax-preparers or other

Much of the tax evidence concerned Ryan's use of CFR funds to pay for personal expenses. At the time that Ryan served as Secretary of State, Illinois law permitted individuals to use campaign funds for personal expenses, but federal law required that the amount of such funds be reported as personal income. Tr. at 17396–97 (Schindler). Ryan relies on the testimony of Shari Schindler, the government's tax expert, for the proposition that the tax regulation governing the use of campaign funds for personal expenses is obscure, and that the distinction between "campaign" and "personal" is a "gray area." Ryan Rule 29 Mot. at 19 (quoting Tr. at 17735 (Schindler)). There is evidence in the record, however, that Ryan received written memoranda from Roger Bickel, who served as General Counsel during Ryan's tenure as Secretary of State, which disclosed Ryan's obligation to pay income tax on CFR funds used to pay for personal expenses. See Tr. at 16287 (Montague). This evidence is sufficient to support the jury's conclusion that Ryan was aware of the obligation to report personal expenses paid with CFR money on his tax return.

In any event, although the distinction between campaign-related and personal expenses may be a "gray area," the distinction was rarely at issue with respect to the items that the government charged Ryan with deliberately omitting from his income tax returns. Among those items were charges for various "pleasure trips" taken by George Ryan during the years 1995 through 1998. Gov't Resp. at 40. With respect to the majority of those trips, Ryan reported

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assistants to omit particular items from his tax returns. *See, e.g.*, Tr. at 17691 (Schindler).

some but not all of the charges that were incurred during those trips. *See, e.g.*, Tr. at 17690, 17692, 17696 (Schindler). The jury could, therefore, readily have concluded Ryan was never genuinely confused about whether those trips were personal rather than campaign-related. What this pattern of reporting may suggest, however, is that these charges were omitted inadvertently, particularly as the reported charges were often greater than the charges that Ryan failed to report. For example, in connection with a 1995 trip to Jamaica, Ryan reported as personal income $758 of CFR funds used to pay for airfare, but omitted $236 in charges for a one-night stay at an airport hotel prior to the trip. Tr. at 17678–79 (Schindler).

The government suggested that these items were omitted because the system that Ryan put into place for documenting personal and campaign expenses was flawed. A pattern of omitting some charges, but not other, larger charges relating to the same event, arguably undermines the government's theory that this system was deliberately put into place to avoid taxes and support Ryan's lifestyle. Cf. Tr. at 23118 (Gov't Closing). The fact that Ryan could or should have played a more active role in ensuring that all charges were properly identified, standing alone, might not be sufficient circumstantial evidence that he willfully omitted income from his tax returns. *Cf. United States v. Stokes*, 998 F.2d 279, 281 (5th Cir. 1993) ("[E]vidence of a consistent pattern of under reporting large amounts of income will support the necessary inference of willfulness.").

There was, however, stronger circumstantial evidence of willfulness with respect to other unreported income for each of the tax years for which Ryan was charged with filing false returns (1995–98):

A. Gramm Campaign Funds (1995–96)

In 1995, Ryan agreed to endorse Phil Gramm in his bid for the Republican nomination for president and to serve as Gramm's campaign chairman in Illinois. Tr. at 8914–15 (Gramm). Included in the campaign's Illinois budget was a line item for "consulting" services to be paid by the campaign to American Management Resources ("AMR"). Tr. at 8762–63 (Weaver). Unbeknownst to Gramm or to his national field director, *see* Tr. at 8922–24 (Gramm) and Tr. at 8773–74 (Weaver), Ryan, Fawell and Juliano were the beneficiaries of those consulting payments. Ryan directed that his portion of the Gramm money be paid to his daughters, even though they did not perform any significant work on the campaign. *See* Tr. at 10857 (Meyer). The jury could have reasonably concluded that by using AMR as a conduit for the Gramm money (an arrangement that Ryan at least acquiesced in), and then funneling that money to his daughters, Ryan was attempting to preclude discovery of this arrangement by anyone—including the IRS. *See Spies v. United States*, 317 U.S. 492, 499 (1943) (Tax evasion "may be inferred from conduct such as . . . concealment of assets or covering up sources of income . . . and any conduct, the likely effect of which would be to mislead or to conceal.").

After a tax investigation was launched, Tr. at 17811 (Schindler), Ryan amended his 1995 and 1996 tax returns to include income connected with the work he performed for the Gramm campaign. Tr. at 10853–54 (Meyer). In a statement attached to his amended returns, Ryan claimed that he had not expected payment for his work on the Gramm campaign, but was told by some unidentified person

"that the national campaign did intend to pay me for my work." Gov. Exs. 25- 003, 25-006 and 25-007. This statement was contradicted by Gramm's and Weaver's testimony that they did not intend to pay Ryan, and were unaware that Ryan was in fact receiving payments through AMR. Ryan further claimed in his statement to the IRS that he was not aware that he was required to pay income tax for his work because his daughters (and not Ryan) received the money. *Id.* The jury was entitled to disbelieve this statement, see *United States v. Agostino*, 132 F.3d 1183, 1193 (7th Cir. 1997), and could have reasonably concluded that the pattern of deception surrounding these payments indicated that Ryan willfully chose not to report the payments for work that he performed. *See Spies*, 317 U.S. at 499.

B. CFR Payments to Michael Fairman (1996–97)

In 1996 and 1997, Ryan directed payments of CFR money totaling approximately $55,000 to his son-in-law, Michael Fairman. Tr. at 17070 (Fairman). At that time, the Fairmans were experiencing financial difficulties, and Ryan's daughter, Lynda Fairman, asked her father for assistance. Ryan responded by putting Michael Fairman on the CFR payroll as a consultant, Tr. at 16664 (L. Fairman Stip.), even though Mr. Fairman never performed any consulting services for Ryan or CFR and understood the money to be a gift. Tr. at 17076, 17079 1785–86 (Fairman). To comply with federal tax law, Ryan was required to pay taxes on this gift. He did not do so until amending his 1996 and 1997 tax returns in 2002, by which time an investigation into Ryan's tax returns had already been launched. See Tr. at 17811 (Schindler). As he had done with respect to the

Gramm payments, Ryan included a statement with his amended returns claiming that he did not believe he was required to pay taxes on the payments so long as Fairman paid taxes on the amounts he received. Tr. at 10857 (Meyer).[8] As previously discussed, however, Mr. Bickel's memoranda explained that Ryan was obligated to report as income his personal use of campaign funds, Tr. at 16287 (Montague), and there can be no question that these payments to Mr. Fairman were personal expenses. And in contrast to the charges associated with personal trips that were omitted from Ryan's tax returns, Ryan was personally involved in the decision to label the large sums of money Mr. Fairman received as payments for "consulting." The jury could have reasonably concluded that Ryan deliberately chose to characterize the payments as "consulting" fees to avoid paying income taxes on those payments. There was sufficient evidence to support the jury's finding that Ryan did not believe his tax return for that year was "true and correct as to every material matter." 26 U.S.C. § 7206(1).

C. CFR Payments to Nancy Smith (1998)

In 1998, Ryan directed CFR payments totaling $6,000 to Nancy Smith, the care-taker of Ryan's mother-in-law. Tr. at 13575 (Smith). Ms. Smith testified that she did not work directly for the campaign in any respect, *id.*, and on that basis Agent Schindler concluded that this was a personal and not a campaign expense that should have been included on Ryan's income tax return. Tr. at 17430 (Schindler). At trial, Ryan argued that this was a campaign

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[8] This statement does not mention Ryan's decision to identify Fairman as a consultant when, in fact, he served no such role.

expense, on the theory (propounded by Mr. Fawell) that Ms. Smith's services enabled Lura Lynn, Ryan's wife, to assist him on the campaign trail. Tr. at 23460 (Ryan Closing); see also Tr. at 4581 (Fawell). The jury was entitled to reject this explanation, and, moreover, could have found that Ryan contradicted this theory in statements he made to a reporter on February 14, 2001, in which he stated that Ms. Smith was paid for campaign work she performed. Tr. at 17865 (Olsen Stip.). Accordingly, the jury could have reasonably concluded both that the expense was personal and that Ryan believed it to be personal. Moreover, the expense was large enough and sufficiently outside the ordinary course that the jury could infer that Ryan was aware that the expense was not on the list of personal expenses that Bickel had prepared for that tax season. There was sufficient evidence, therefore, to support the jury's conclusion that the tax return Ryan filed for 1998 was willfully false.

IV. There Was Sufficient Evidence to Support Defendant Warner's Conviction for Money Laundering

Defendant Warner was convicted of two counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i).[9] The mail fraud and extortion

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[9] The statute provides in pertinent part as follows:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of the specified unlawful activity–

(B) knowing that the transaction is deigned in whole or in part–

charges in Count Two relating to the validation stickers contract and computer systems contract provided the predicate "unlawful activity" for the money laundering charges in Counts Fifteen and Sixteen. Warner contends that the evidence was insufficient to support the jury's conclusion that Warner concealed or attempted to conceal the proceeds of those activities. *See* Warner Post-Trial Mot. at 8. Warner also challenges the viability of the money laundering counts as charged, arguing, *inter alia*, that the sources of the allegedly laundered proceeds were not the alleged victims of the predicate acts. *Id.* at 9–10.

A. Proceeds of Honest Services Fraud

As a threshold matter, the court notes that the Seventh Circuit's recent decision in *United States v. Boscarino* refutes Warner's argument that honest-services mail fraud cannot constitute the predicate "unlawful activity" for a money-laundering conviction. 437 F.3d 634, 636 (7th Cir. 2006). The court must, therefore, decline Warner's invitation to rule otherwise. Warner Post-Trial Mot. at 25.

Boscarino likewise requires the court to reject Warner's argument that Counts Fifteen and Sixteen are defective because the "proceeds" of the mail fraud charge were derived from American Decal and IBM, not from the State of Illinois—the alleged victim of

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(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . . .

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

the mail-fraud charges in Count Two. In *Boscarino*, a manager of an insurance brokerage firm, Aulenta, caused the firm to write a check to a corporation that the defendant, Boscarino, controlled—ostensibly as a referral fee for Boscarino's efforts to persuade the City of Rosemont to do business with the firm. 437 F.3d at 635. Boscarino endorsed the checks to Aulenta, who then split the proceeds with Boscarino and covered the firm's missing funds by overbilling Rosemont. *Id.* at 635–36. Boscarino was charged with mail fraud, and because Aulenta owed his employer a duty of loyalty, "one aspect of the scheme was to defraud ABI/Acordia of Aulenta's honest services." *Id.* at 636. After rejecting the defendant's statutory argument that honest-services mail fraud cannot serve as the predicate offense for a money-laundering charge, the court addressed the defendant's contention that depriving an employer of "honest services" does not necessarily yield "proceeds." *Id.* The court concluded that this truism did not preclude application of the money-laundering statute in a case of to honest-services mail fraud that does create proceeds. *Id.* By way of example, the *Boscarino* court stated that a judge who accepted bribes and deprived the public of his honest services could be convicted of money-laundering: the bribes are the "proceeds" of the fraud, even if "he did not take the money from the public coffers." *Id.* (citing *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985)).

Warner was charged with laundering the proceeds of the alleged schemes involving the validation-stickers contract (Count Fifteen) and the computer-systems contract (Count Sixteen). Money that Warner received from American Decal in connection with the validation-stickers contract was deposited

into the checking account of a company (National Consulting Company ("NCC")) that Warner controlled. Tr. at 16901 (Schindler); Gov. Ex. 02-500. Warner caused NCC to issue checks payable to AMR, a company controlled by alleged co-conspirator Alan Drazek, amounting to one third of the proceeds Warner received from American Decal. Tr. at 16910 (Schindler); Gov. Ex. 02- 501. Warner sent these checks to Mr. Udstuen, who in turn sent them to AMR. Tr. at 11650–51 (Udstuen). Drazek would then cash the checks, keeping some money for himself and delivering the balance in cash to Udstuen. Tr. at 11663 (Udstuen).

Warner and Udstuen used a similar process for checks Warner received from IBM in connection with the computer-services contract. The IBM payments were placed in the bank account of another company that Warner controlled, Omega Consulting Group Ltd. ("Omega"); Warner caused Omega to issue checks payable to AMR; and Drazek cashed the checks, keeping some money for himself and delivering the rest to Udstuen. Tr. at 16916 (Schindler); Tr. at 11663 (Udstuen); Gov. Exs. 04-500, 04-501. The money that Warner received from American Decal and IBM constituted the "proceeds" of the alleged scheme to award public contracts to Warner's lobbying clients while Warner and others provided gifts and other benefits intended to influence Ryan in the performance of his official acts. *See* Indict. Count II. The jury could fairly conclude that disguising the origins of these proceeds amounted to money laundering. See *Boscarino*, 437 F.3d at 636.

Warner also contends that the government failed to establish that the payments to AMR were the net

rather than the gross proceeds of Warner's misconduct, citing *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002). Warner Rule 29 Mot. at 9. This court previously rejected this argument in response to Warner's motion to dismiss. Counts Fifteen and Sixteen of the Indictment. See *United States v. Warner*, 292 F. Supp. 1051, 1066 (N.D. Ill. 2003). As this court previously discussed, *Scialabba's* holding was predicated on the nature of the underlying crime, (gambling), which made it difficult to distinguish the crime itself from the proceeds of the crime. *Scialabba*, 282 F.3d at 475 ("We conclude that, at least when the crime entails voluntary, business-like operations, 'proceeds' must be net income; otherwise the predicate crime merges into the money laundering . . . ."). In *Scialabba*, the government charged the defendants with violating § 1956(a)(1) by using the money they received from video-poker machines to pay for the expenses of their business, such as "leasing the video poker machines and obtaining amusement licenses for them from the state." *Id.* at 476. The Seventh Circuit likened this argument "to saying that every drug dealer commits money laundering by using the receipts from the sales to purchase more stock in trade." *Id.* By contrast, the NCC and Omega payments to AMR were not the costs of doing business. According to the Indictment, Warner directed NCC and Omega to issue checks payable to AMR so that Udstuen would receive a portion of the money without being publicly linked to Warner. AMR served no discernable function in this series of transactions other than to disguise the provenance of the proceeds. Accordingly, there is no difficulty distinguishing the underlying crime from the subsequent transactions in the proceeds of the crime.

B. Sufficiency of the Evidence of Concealment

To convict Warner under 18 U.S.C. § 1956(a)(1)(B)(i), the government was required to prove that Warner "conducted a financial transaction knowing that the property involved in the transaction was illegally derived and knowing that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds." *United States v. Esterman*, 324 F.3d 565, 569 (7th Cir. 2003). The Seventh Circuit has articulated two broad principles governing § 1956 liability. *Id.* at 570. First, the focus is on the "transaction in proceeds, not the transaction that creates the proceeds." *United States v. Mankarious*, 151 F.2d 694, 705 (7th Cir. 1998); see also *Esterman*, 324 F.3d at 573 ("[I]t is important, even if difficult at times, to ensure that the money laundering statute not turn into a money spending statute.") (citation and internal quotation marks omitted). Second, the defendant must do more than simply transfer, then spend, the proceeds at issue. *Esterman*, 324 F.3d at 570. Rather, the defendant's transactions with the proceeds of unlawful activity must be "specifically designed 'to hide the provenance of the funds involved.'" *Id.* (quoting *United States v. Jackson*, 935 F.2d 832, 843 (7th Cir. 1991)).

Warner argues that the AMR/Udstuen transactions do not demonstrate an intent to conceal the proceeds of unlawful activity, as the two companies transferring money to AMR (NCC and Omega) were legitimate companies with undisguised ties to Warner. Warner Rule 29 Mot. at 8 Using sham companies to transact business using the proceeds of

unlawful activity is one way the government may demonstrate an intent to conceal. *See, e.g., Esterman*, 324 F.3d at 573 (listing types of circumstantial evidence that may show an intent to conceal). But it is not the only way. Mr. Udstuen testified that Warner offered to give him a portion of the money that he (Warner) received from contracts with the Secretary of State's Office. Tr. at 11621–22 (Udstuen). Udstuen was concerned, however, that accepting money directly from Warner would jeopardize Udstuen's position at the Illinois State Medical Society. Tr. at 11628 (Udstuen). In order to conceal the fact that he was receiving money from Warner, Udsteun proposed using AMR as a conduit for Udstuen's portion of the American Decal and IBM money, and Warner agreed to this arrangement. Tr. at 11629, 11646 (Udstuen). AMR's only function in this series of transactions was to disguise the source of the money that Udstuen was receiving. See *Esterman*, 324 F.3d at 573 (intent to conceal may be shown by the "use of third parties to conceal the real owner, or engaging in unusual financial moves culminating in a transaction."). Cf. *United States v. Blankenship*, 382 F.3d 1110, 1129 (11th Cir. 2004) (defendant offered uncontradicted testimony that he used a separate, "dba" bank account to deposit proceeds because his bank would not permit him to deposit the checks into his personal account). This record stands in sharp contrast to the cases Warner cites where the defendant did little more than spend or transfer (more or less conspicuously) the proceeds of his or her unlawful behavior.[10] The court concludes

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[10] *Cf. Esterman*, 324 F.3d at 571; *United States v. Corchado-Peralta*, 318 F.3d 255, 259 (1st Cir. 2003); *United States v. Olaniyi-Oke*, 199 F.3d 767, 770–71 (5th Cir. 1999); *United States*

that the evidence was sufficient to support Warner's money-laundering convictions.

Warner makes one further, technical challenge to the Indictment: He contends that the reference in Count Fifteen to the extortion statute is inappropriate because there is no allegation that IBM was an extortion victim. Warner Rule 29 Mot. at 10; cf. Indict. Count XIV (charging Warner with extortion in connection with the validation stickers contract). Assuming the reference in Count Fifteen to § 1951 was inappropriate, the error is harmless as the mail fraud charges referenced in the same Count formed a sufficient basis on which to conclude that the government satisfied the "unlawful activity" element of the money-laundering statute.

V. There Was Sufficient Evidence to Support Defendant Warner's Conviction for Illegal Structuring

Defendant Warner was convicted of one count of purposefully structuring transactions to avoid CTR requirements in violation of 31 U.S.C. § 5324(a)(3). On July 31, 1997, Warner caused two checks to be written—one for $9,000 and one for $5,000—on Omega Consulting's bank account, the account into which Warner placed money he received from IBM. Tr. at 12495–96 (Karcazes); Gov. Ex. 08-039; Tr. at 16916 (Schindler). Warner later cashed these checks on August 4, 1997 and August 5, 1997 at two

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v. Herron, 97 F.3d 234, 237 (8th Cir. 1996)("[T]he money-laundering statute should not be used as a money-spending statute.") (citation and internal quotation omitted); *United States v. Rockelman*, 49 F.3d 418, 422 (8th Cir. 1995); *United States v. Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994); *United States v. Sanders*, 928 F.2d 940, 945 (10th Cir. 1991).

different North Community Bank branches. Tr. at 12495–96 (Karcazes); Gov. Ex. 08-039. Warner contends that the evidence was insufficient to support the jury's finding that he acted purposefully to avoid CTR requirements. Warner Rule 29 Mot. at 12; Post-Trial Mot. at 25–26. Specifically, Warner argues that the fact of structuring transactions cannot be used to infer an intent to violate the statute. Warner Rule 29 Mot. at 12.

Warner relies exclusively on cases applying the "willfulness" requirement before Congress amended the anti-structuring statute in response to *Ratzlaf v. United States*, 510 U.S. 135 (1994). *See, e.g.*, United States v. Vasquez, 53 F.3d 1216, 1222 (11th Cir. 1995). In *Ratzlaf*, the Supreme Court held that Congress' use of the word "willfully" in 18 U.S.C. §§ 5322(a) & 5324(a)(3) required the government to prove that the defendant knew that his conduct was unlawful, not simply that he acted to avoid the financial institution's reporting requirement. 510 U.S. 135, 146–48 (1994); *see also United States v. Obiechie*, 38 F.3d 309, 313 (7th Cir. 1994). Congress subsequently amended the statute to eliminate the reference to "willfulness." *United States v. Griffith*, 84 F.3d 912, 923 n.7 (7th Cir. 1996). The statute now requires the government to prove that the defendant acted purposefully to evade the bank's CTR requirement, not that the defendant knew that such conduct was unlawful. *United States v. Pang*, 362 F.3d 1187, 1193 (9th Cir. 2004). Under the amended anti-structuring statute, the fact of structuring may well support the inference that the defendant acted purposefully to avoid the bank's CTR obligations. *See, e.g., United States v. Cassano*, 372 F.3d 868, 879 (7th Cir. 2004) (*vacated on other grounds by Cassano v.*

United States, 543 U.S. 1109 (2005)) (inferring knowledge of an intent to avoid CTR obligations from, among other evidence, a large number of transactions under $10,000); *United States v. MacPherson*, 424 F.3d 183, 192 (2d Cir. 2005).[11]

Warner served on North Community Bank's Board of Directors from 1998 to 2002. Tr. at 12483 (Karcazes). Warner's co-member on the Board, George Karcazes, testified that North Community maintained and regularly updated a "Bank Secrecy Policy" which discussed the bank's obligation to file CTR's for transactions in excess of $10,000 cash. T at 12488 (Karcazes). Policy updates were approved by the Board of Directors, including Warner. Tr. at 12490–93 (Karcazes). In light of his many years as a North Community Director, and the fact that the CTR requirement was discussed in the Bank Secrecy Policy that Warner approved, the jury could have reasonably concluded that Warner was aware of the bank's reporting obligation. Moreover, the nature of Warner's transactions support the inference that he intended to avoid the bank's disclosure obligation. Warner caused two checks to be written on the same day in amounts under the $10,000 threshold.[12]

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[11] See also *United States v. Ismail*, 97 F.3d 50, 56 (4th Cir. 1996) (Applying pre-amendment statute, but inferring knowledge of bank's reporting obligations and intent to avoid CTR's from circumstantial evidence that defendants knew of the obligation and multiple transactions "just under $10,000"); *United States v. Wynn*, 61 F.3d 921, 927–28 (D.C. Cir. 1995) (Applying pre-amendment statute, but noting that using multiple checks under $10,000 to satisfy a single debt "created an inference that [the defendant] was motivated to avoid the reporting requirement.").

[12] The government speculates that Warner may have used the cash withdrawals to "take care of Ryan." Gov't Resp. at 48.

Warner subsequently cashed the checks on consecutive days at two separate North Community bank locations within one week of causing the checks to be written. The evidence further established that during 1997 Warner made numerous large withdrawals without ever exceeding the $10,000 threshold. Gov. Ex. 08-510; Tr. at 17232–33 (Schindler); *see MacPherson*, 424 F.3d at 191–92. Together with the circumstantial evidence that Warner was aware of the CTR requirement, the jury could have reasonably inferred from this pattern of behavior that Warner acted purposefully to avoid triggering the bank's disclosure obligation.

VI. Defendant Warner's Trial Was Properly Joined with Defendant Ryan's

Defendant Warner requests a new trial on the grounds that the court should have granted his request for severance. Warner Post-Trial Mot. at 1, 8. Warner made numerous motions for severance both before and during the trial, beginning in January

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Neither the source of the proceeds nor the purpose for which they were withdrawn, however, is material to § 5324 liability. It is enough to sustain a conviction under the anti-structuring statute that defendant purposefully structured a transaction to avoid the reporting requirement, whatever ultimate purpose the defendant hoped to accomplish by not drawing unwanted attention to the transaction. See United States v. Gabel, 85 F.3d 1217, 1223 (7th Cir. 1996) ("The reporting requirement is central to this offense; it would make no difference to the Treasury if someone illegally structured a transaction to avoid reporting an exceptionally generous gift that fell above the $10,000 threshold, or if she wanted to avoid reporting the receipt of illegal proceeds."); United States v. Gibbons, 968 F.2d 639, 645 (8th Cir. 1992) ("The focus of the statute is on the structuring person's conduct, not on the reason why he did not want the transaction report filed.").

2004 when counsel for the newly-indicted and joined Ryan requested that Warner's original trial date of February 23, 2004, be reset, allowing the Ryan defense team time to prepare. *United States v. Warner*, No. 02 CR 506, 2004 WL 144125, at *1 (N.D. Ill. Jan. 16, 2004). This court denied Warner's implied request for a severance, finding at that time that Warner could show neither evidentiary or substantive prejudice from a delay and that trying Ryan and Warner separately would tax both the government's and the court's resources significantly. *Id.* at *5.

Prior to trial in February 2004, Warner again moved for severance. Warner, 2004 WL 1794476, at *23. He noted that Ryan was named as the sole defendant in nine of the indictment's twenty-two counts. *Id.* at *24. Of these, the court observed that Counts Six and Ten, related to the South Holland lease and Grayville prison mail-fraud sequences, were sufficiently similar to Counts Two, Three, Four, Five, Seven, Eight, and Nine—mail-fraud sequences with which Warner was allegedly involved—so as not to require severance. *Id.* Further, the court concluded that any prejudice to Warner arising from the court joining these counts could be addressed through limiting instructions to the jury. *Id.* With respect to the remaining seven false statement and tax counts levied against Ryan alone, the court noted that severance remained inappropriate so long as the evidence related to these counts was relatively brief and presented at the end of the government's case. *Id.* In the alternative, the court said it would consider bifurcating these counts and trying them to the same jury after it had returned a verdict on the mail fraud and RICO counts. *Id.* Such a procedure would

alleviate Warner's confrontation concerns arising from the introduction of Ryan's purportedly false statements that he appointed Warner to the McPier Board on the recommendation of another member; that he never discussed the Joliet lease or SOS Office leases with Warner or had any personal knowledge that Warner profited from those leases; and that he had no personal financial relationship with Warner. *Id.* On the other hand, the court also noted that none of Ryan's statements pertaining to Warner were in fact inculpatory. *Id.* Finally, the court did not believe that a Warner-only trial would mean that his trial would be free of hardships, including extensive press coverage, attributable to co-defendant Ryan's notoriety. *Id.* & n.16.

Warner again requested severance or bifurcation of the Ryan-only counts in 2005. *United States v. Warner*, 396 F. Supp. 2d 924, 933 (N.D. Ill. 2005). With respect to the court's ruling on Counts Six and Ten, Warner argued that the similarity between the Ryan-only mail fraud counts and the mail-fraud counts involving both Defendants exacerbated rather than alleviated the possibility of juror confusion. *Id.* The court stood by its earlier ruling, observing that there was no reason to believe that the jury would disregard an instruction to consider the evidence related to each count separately. *Id.* at 935-36. The court, however, reserved a ruling on Warner's request for bifurcation of the Ryan-only tax and false-statement counts, pending clarification from the government on how much evidence it intended to introduce to prove those charges. *Id.* at 936.

Warner renewed his motion to sever and re-raised these arguments several more times during the course of the trial. Def. Warner's Mot. to Bar Proof at

the Joint Trial and Renewed Mot. for Severance, 01/9/06, at 1; Def. Warner's Renewed Motion for Severance at the Close of the Government's Case, 02/02/06, at 1; Def. Warner's Renewed Motion for Severance at the Close of the Defendant's Case, 02/23/06, at 1. Ultimately, this court did not grant Warner severance or bifurcation; however, the court addresses the arguments raised in these briefs to the extent that they remain relevant.

Warner argues that this court erred in denying his requests for severance or bifurcation. He contends, first, that joinder was impermissible because "[t]he indictment does not show, nor has the government established, the existence of a single overarching conspiracy involving both defendants." Def. Warner's Renewed Motion for Severance at the Close of the Government's Case, 02/2/06, at 5. Second, Warner argues that he was prejudiced by the abundance of evidence that was admitted solely against Ryan that would not have been admitted against him alone. *Id.* at 1. Third, Warner argues that the evidence the government introduced against Ryan on the false-claims counts violated Warner's constitutional right to confrontation. *Id.* at 5.[13]

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[13] Because Warner was tried with a public official, Warner also contends that, in addition to sorting out what evidence applied to which Defendant, the jury was also tasked with making the difficult determination of which legal duties applied to which Defendant. Def. Warner's Renewed Motion for Severance at the Close of the Government's Case, 02/2/06, at 4. Although the court did instruct the jury on these matters, Warner contends that these jurors proved themselves incapable of following such instructions. Warner Post-Trial Mot. at 9. The court will address this argument in the section on juror-related issues. *See infra* Part IX.G.

Defendants may be joined in a single indictment where they are "alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." FED. R. CRIM. P. 8(b). The propriety of joinder is assessed from the face of the indictment and not based on the evidence actually adduced at trial.[14] *Lanas*, 324 F.3d at 899. Thus, Warner's first argument is without merit. The court determined that the Second Superseding Indictment charged Warner and Ryan with a single overarching conspiracy and a single scheme to defraud, *Warner*, 2004 WL 144125 at *1, and stands by its original determination that joining Warner and Ryan accords with the Federal Rules.

The Rules do authorize severance where the court determines that, nonetheless, "joinder . . . of defendants in an indictment . . . or . . . for trial appears to prejudice a defendant . . . ." FED. R. CRIM. P. 14(a). The Supreme Court in *Zafiro v. United States* explained that "when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the

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[14] It is possible that Warner's reference to the evidence adduced at trial is an invocation of a claim of "retroactive misjoinder," a circumstance in which the government alleges a link between charges or defendants in the indictment, but never actually introduces any evidence to substantiate that allegation, and the defendant is prejudiced as a result. See *United States v. Velasquez*, 772 F.2d 1348, 1354-55 (7th Cir. 1985). The court's determination that the evidence adduced at trial provided a reasonable basis for jury to convict on Count One and discern a single scheme to defraud the State of Illinois defeats any such argument here.

defendants, or prevent the jury from making a reliable judgment about guilt or innocence." 506 U.S. 534, 539 (1993). Furthermore, "[b]ecause Rule 14 assigns to the district court the task of balancing the cost of multiple trials against the possible prejudice inherent in a single trial . . . [i]n order to prevail on this issue, a defendant must demonstrate that the denial of severance caused him actual prejudice that deprived him of his right to a fair trial; it is insufficient that separate trials would have given a defendant a better opportunity for an acquittal." *United States v. Rollins*, 301 F.3d 511, 518 (7th Cir. 2002) (internal quotation marks and citations omitted).

Having presided over the lengthy trial in this case, the court is not persuaded that Defendant Warner was prejudiced by the "abundance of evidence that was admitted solely against Co-defendant Ryan." Def. Warner's Renewed Motion for Severance at the Close of the Government's Case, 02/2/06, at 1. Warner's brief includes a two-and-a-half page list of evidence he urges would not have been admissible had he been tried without Ryan. *Id.* at 2-4. The government responds by observing that this lengthy trial involved the testimony of more than 100 witnesses and the adduced at trial provided a reasonable basis for jury to convict on Count One and discern a single scheme to defraud the State of Illinois defeats any such argument here introduction of more than 1,000 exhibits, the majority of which pertained to both Defendants. Gov't Reply at 57. Even if this were not the case, that the evidence against Ryan was proportionally greater the evidence against Warner, standing alone, would not be a ground for severance. *Diaz*, 876 F.2d at 1344, 1357.

Moreover, Warner's list of Ryan-only evidence overstates the potential prejudice. In both mail fraud and conspiracy cases, evidence of one defendant's acts in furtherance of the scheme or conspiracy are admissible against any other participant in the scheme or conspiracy, even if such a participant did not specifically know what his co-defendant was doing. *Adeniji*, 221 F.3d at 1027. Thus, where evidence pertaining to counts in which Ryan alone was named also dealt with the single conspiracy set out in Count One or the overarching conspiracy laid out in Counts Two through Ten, that evidence would also have been admissible against Warner even in a separate trial. The government also correctly notes that Ryan's tax and false statement charges flowed from the overarching conspiracy and scheme to defraud and that the evidence introduced against Ryan only to support those counts was not inflammatory or otherwise obviously prejudicial to Warner. Gov't Resp. at 57. The court is sympathetic to Warner's position that he should not be found guilty by association. Warner Post-Trial Mot. at 12. Under the law of conspiracy, Warner is in fact accountable for the acts of his associates.

Warner also suggests that the intense media coverage and notoriety attendant with sharing a courtroom with a prominent public official would not have developed, had the court granted Warner's request for severance. Warner Post-Trial Mot. at 13. Respectfully, the court suggests that recent experiences—including the criminal prosecutions of Scott Fawell, a few years ago, and, more recently, Robert Sorich—suggest otherwise, and dispel the notion that the absence of the prominent public official popularly associated with a particular

defendant would dim the media spotlight or dull the public's interest.

Finally, Warner argues that the denial of severance compromised his right to confrontation. Warner Post-Trial Mot. at 11. Warner notes that the government proved its false statements charges against Ryan in part by introducing out-of-court statements Ryan made about Warner, and argues that the court's instructions to the jury not to consider those statements as evidence against Warner were inadequate under *Bruton v. United States*, 391 U.S. 123 (1968) ("holding that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant."). Warner further argues that the Supreme Court's recent decision in *Davis v. Washington*, 126 S. Ct. 2266 (2006) controls because Ryan's statements to the FBI and the U.S. Attorney constitute "testimonial evidence" that should have been barred absent the opportunity to cross-examine. Warner Reply at 5; *see Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (holding that the Sixth Amendment bars the admission of testimonial statements of a nontestifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination).

In this case, the court carefully excluded all of Ryan's out-of-court statements referring to Warner except uncontested background statements and statements deemed noninculpatory. Tr. at 17903-05 (01/25/06). Because the statements that were admitted were not inculpatory, they do not raise

Confrontation Clause issues. *See Richardson v. Marsh*, 481 U.S. 200, 207-08 (1987) (distinguishing *Bruton* as applying only when a codefendant's out-of-court statement is so expressly and powerfully incriminating on its face that an "overwhelming probability" exists that the jury cannot disregard the incriminating reference). Moreover, the statements were not introduced for the truth of the matter asserted; to the contrary, the government contended Ryan's statements were untruthful. Thus, as to Warner, the statements are not hearsay and do not implicate the Confrontation Clause. *See Crawford*, 541 U.S. at 59 n.9 ("The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.") (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

Because Ryan's out-of-court statements admitted into evidence are neither inculpatory nor hearsay, the court need not reach Warner's argument that the statements should have been barred because they were "testimonial" under *Davis*. Warner Reply at 5. In *Davis*, the Court explained that only the "testimonial statements" of a hearsay declarant implicate *Crawford*. 126 S. Ct. at 2273 (quoting Crawford, 541 U.S. at 53-54). The Court defined "testimonial" as statements made in response to a police interrogation, the primary purpose of which "is to establish or prove past events potentially relevant to later criminal prosecution" rather than assist police in dealing with an ongoing emergency. *Id.* at 2273-74; see *United States v. Tolliver*, 454 F.3d 660, 665 (7th Cir. 2006) (defining "testimonial" statements as those a declarant makes "in anticipation of or with an eye toward a criminal prosecution."). Warner

argues that Ryan's statements to the FBI and the U.S. Attorney clearly fall within that definition. Warner Reply at 5. But whatever its merits, his argument is inapplicable here, where the statements were not offered for their truth. Neither *Davis* nor *Crawford* applies to bar non-hearsay evidence. See Tolliver, 454 F.3d at 666 (discussing *Davis* and emphasizing that the testimonial versus nontestimonial issue was irrelevant, and *Crawford* not implicated, where out-of-court statements were offered for context and not for their truth; admission of such statements "does not offend the Confrontation Clause because the declarant is not a witness against the accused."). The court thus concludes that the Confrontation Clause is not implicated here.

VII. Jury Instruction Challenges

A. The Court Properly Gave the Jury a *Pinkerton* Instruction

Defendant Ryan argues that the court erred in giving the jurors, a so-called Pinkerton instruction. The disputed instruction stated, in part, as follows:

> A conspirator is a person who knowingly and intentionally agrees with one or more persons to accomplish an unlawful purpose. A conspirator is responsible for offenses committed by his fellow conspirators if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of and as a foreseeable consequence of the conspiracy.

Final Jury Instr. at 73. The instruction went on to direct the jurors, if they found Ryan guilty of the conspiracy charged in Count One, to find him guilty of each of the mail fraud counts applicable to Ryan,

provided that the government also proved that the offense was committed: "(a) by his fellow conspirators in furtherance, and as a foreseeable consequence, of the conspiracy charged in Count 1, (b) while defendant Ryan was a member of the conspiracy charged in Count 1." *Id.* A separate paragraph gives the same instruction with respect to Warner. Ryan does not contend that this instruction misstates the law; rather, he argues that *Pinkerton* instructions are inappropriate in RICO cases and that the instruction in this case was confusing because neither the indictment nor the proof in the case was premised on vicarious conspiratorial liability. Ryan Post-Trial Mot. at 52–53.

The RICO statute does not preclude the use of *Pinkerton* instructions, and the Seventh Circuit has stated that the use of such instructions in RICO cases is not "wrong or improper." *Neopolitan*, 791 F.2d at 504 n.7; *see also United States v. Campione*, 942 F.2d 429, 437–38 (7th Cir. 1991). The *Pinkerton* instruction given to the jury in this case closely tracked the Seventh Circuit's pattern instruction, and accurately states the law with respect to co-conspirator liability. There is, therefore, no basis for requiring a new trial in the substance of the instruction itself, nor in the fact that it was given in the context of a case containing a RICO conspiracy charge.

Nevertheless, Ryan contends that the jury received mixed signals about whether the government was pursuing a direct or vicarious liability theory. As Ryan points out, the Indictment does not charge Ryan with conduct in which only Warner participated directly (e.g., extortion, money laundering and illegal structuring), and vice versa.

Moreover, the court instructed the jury throughout the trial that particular evidence pertained only to Ryan, not Warner. *See, e.g.*, Tr. at 14564 (01/04/06). Ryan assumes that the jury took from the Indictment and the limiting instructions a broad rejection of vicarious liability, which the Pinkerton instruction confusingly contradicted.

The court believes that this argument is speculative and overstates the impact of the limiting instructions, which were necessarily narrow and fact-specific. There is no reason to conclude that the jury inferred from one or more of these instructions that vicarious liability did or did not apply to the case as a whole. Ryan's argument is further undercut by the fact that the *Pinkerton* instruction concerns a theory of liability, not a substantive crime or defense. So, while Ryan is correct that the government's arguments at trial tended to emphasize Ryan's personal participation in the alleged schemes, a vicarious-liability theory was not incompatible with the evidence presented at trial. *Cf. Humphry v. Staszak*, 148 F.3d 719, 723–24 (7th Cir. 1998) (trial judge committed reversible error by instructing the jury regarding an entrapment defense that had not been pursued by the § 1983 plaintiff and for which there was no evidence in the record). Under the rule established in *Pinkerton*, the government could have placed greater emphasis on Ryan's liability for the actions of his co-conspirators, but chose not to. The court does not believe that that decision confused the jury or prejudiced Ryan.

The jury did state at one point during deliberations that they found the *Pinkerton* instruction "ambiguous." Tr. at 24022–23 (03/16/06). The jury's confusion appears to have arisen from the

language of the instruction itself, which, as previously discussed, closely tracks the Seventh Circuit's pattern instruction, and not with the concept of vicarious liability generally, or how that concept relates to the limiting instructions that the jury received regarding particular evidence. This court's response fully addressed the specific question that the jurors posed, that is, whether they could "skip" Counts Two through Nine. The answer was "no."[15] Ryan points out that the reconstituted jury did not pose this question again, and speculates that the jury must have either remained confused about the instruction or improperly discussed the court's response to the previous note. This is pure speculation, as the course of the reconstituted jury's deliberations could have proceeded in any number of directions such that the question never arose. As with the many other instructions that the reconstituted jury did not specifically inquire about, the court presumes that the jury understood the instruction. *See United States v. O'Neill*, 116 F.3d 245, 249 (7th Cir. 1997) ("We presume that juries understand and follow jury instructions."). Certainly, the court has no basis to abandon that presumption in this case. The court concludes that the *Pinkerton* instruction was

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[15] This court's full response to the jurors' question was as follows: You are to consider the evidence as to each count separately and reach a verdict as to each count separately. Thus, whether you find a defendant guilty or not guilty of Count 1, you must still consider the evidence and reach a verdict as to each of Counts 2 through 10. I remind you to consider all of the instructions you have been given.

Letter from Court to Jurors of 3/20/06.

both an accurate statement of the law and appropriate under the circumstances of this case.[16]

B. The Court Properly Gave the Jury a Partial "Ostrich" Instruction

At the government's request, the court gave an "ostrich" instruction but limited the instruction to the charge relating to the diversion of state resources. With respect to that charge only, the jury was instructed that it could "infer knowledge from a combination of suspicion and indifference to truth." Final Jury Instr. at 27. Defendant Ryan argues that it was error to give any "ostrich" instruction at all, and further contends that the jury could not have performed the "mental gymnastics" required to apply the instruction to some matters but not others. Ryan Post-Trial Mot. at 55–58. An ostrich instruction is appropriate "when a defendant claims a lack of guilty knowledge and where there are facts and evidence which support an inference of deliberate ignorance." *United States v. Lennartz*, 948 F.2d 363, 369 (7th Cir. 1991) (internal quotation marks omitted); see also *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006). The focus is on the defendant's state of mind, not on what an objectively reasonable person might do in the same context. *Carrillo*, 435 F.3d at 781 ("[T]he focus is on what the defendant knew and whether the defendant knew enough to support an inference that he or she remained deliberately ignorant of facts constituting criminal knowledge.").

While the government did present evidence and make arguments concerning Ryan's direct knowledge

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[16] Accordingly, the court does not reach the government's argument that Warner waived, and Ryan forfeited, their objections to the *Pinkerton* instruction. Gov't Resp. at 68.

and participation in diverting state resources for personal and political ends, there was also evidence in the record Ryan deliberately avoided obtaining that knowledge. *See United States v. Carrillo*, 269 F.3d 761, 769 (7th Cir. 2001) ("The government is not precluded from presenting evidence of both an actual knowledge theory and a conscious avoidance theory."). In 1992, Mr. Fawell directed state employees to perform work on Bruce Clark's campaign for state representative. Tr. at 3167 (Fawell). One of those employees, Brad Roseberry, was summoned to a meeting with Fawell, Ryan and others. Tr. at 14273 (Roseberry). When another state employee, Scott Wiseman, suggested that Roseberry take a "leave of absence" from his state employment while working on the Clark campaign, Rose berry testified that Fawell said "[n]o, we are not going to do that." Tr. at 14274 (Roseberry). Ryan said nothing. *Id.* at 14274. In each of the years 1994–1998, Fawell oversaw the diversion of state resources to various political campaigns. Tr. at 3180, 3184, 3190 (Fawell). Ryan's attorneys argued at trial that Mr. Fawell was responsible for diverting these state employees for political purposes, and that he acted without Ryan's knowledge and contrary to Ryan's 1993 directive to state employees prohibiting them from doing political work on state time. Tr. at 23403–04, 23408 (Ryan Closing). Yet there was evidence in the record that when these issues percolated up to Ryan, he chose to look the other way while Fawell—the person who, in December 1994, proposed installing someone in the IG department who "won't ask about FR (fundraising) tickets"— handled it. Gov. Ex. 01-019. So, for example, when Fawell told Ryan that he had arranged for some Secretary of State employees to be paid for work they did in connection with 1996 House

campaigns, Ryan told Fawell that he "[did not] want to hear about it." Tr. at 3193 (Fawell). Fawell also testified that when a Secretary of State employee, Glen Bower, complained to Ryan in 1998 about state employees working for CFR, Ryan asked Fawell to "[j]ust work it out, will you?" Tr. at 3326 (Fawell). In response to Ryan's request, and after receiving complaints from other state employees about Bower, Fawell held a meeting with Bower and other state and campaign employees intended to make Bower stop nosing around with respect to the use of state employees for campaign work. Tr. at 3355 (Fawell). In light of these acts of deliberate avoidance, the court concludes that the ostrich instruction was appropriate.

Nor is the court persuaded that its decision to limit that instruction to the diversion of state resources prejudiced either Defendant. This court chose to limit the application of the ostrich instruction because it believed that, with respect to other factual sequences in this case (for example, tax issues), "the facts and evidence [did not] support an inference of deliberate ignorance." *Carrillo*, 435 F.3d at 782. As previously discussed, jurors are presumed to understand and to follow instructions, and there is no basis in the record to conclude that the jury did not do so in this instance. The Defendants were further protected from the possibility that the jury convicted them for mere negligence by the additional instruction that "[a] defendant's association with alleged conspirators or persons involved in a criminal enterprise is not itself sufficient to prove his participation or membership in a conspiracy or criminal enterprise." Final Jury Instr. at 31; *see Carrillo*, 269 F.3d at 770 (concluding that any harm

resulting from an ostrich instruction was lessened by a "mere association" instruction).

C. The Court Properly Denied Defendant Ryan's Requested Special Verdict Form

The jurors in this case returned a verdict form that asked the jurors whether each Defendant did or did not commit a particular offense, or whether each Defendant was guilty or not guilty of a particular count in the indictment. Defendant Ryan argues that this verdict form was inadequate to assure that the jury was unanimous with respect to each element of each offense.[17] Ryan Post-Trial Mot. at 58. Before closing arguments, Ryan submitted a proposed special verdict form that asked the jurors to make numerous specific factual findings for many counts. Ryan's Proposed Verdict Form. The court declined to use Ryan's proffered verdict form. 3/6/06 Order. Ryan contends that without the use of a specific verdict form, "there is no way of knowing" if the jury unanimously agreed as to which particular conduct gave rise to criminal liability. Ryan Post-Trial Mot. at 58.

Although permitted, special interrogatories or verdicts are "generally not favored in criminal cases." *United States v. Smith*, 938 F.2d 69, 70 (7th Cir. 1991). Ryan argues that in "complex" criminal cases, special verdict forms are not disfavored and "may even be required." Ryan Reply at 25. He cites several cases–none from the Seventh Circuit–in which other courts of appeal found no error in the use of special verdict forms. *See United States v. Stonefish*, 402 F.3d 691, 698 (6th Cir. 2005); *United States v.*

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[17] Defendant Warner does not object to the verdict form.

Palmeri, 630 F.2d 192, 203 (3d Cir. 1980); *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979). These courts did not, however, hold that a district court erred by *not* using a special verdict form; rather, there was no prejudice to criminal defendants where such forms were used. *See Stonefish*, 402 F.3d at 698 (finding juror unanimity satisfied despite the special verdict form, not because of it); *Palmeri*, 630 F.2d at 203 (holding that the trial court did not err in giving the jury special interrogatories because defendants were not prejudiced by their use); *Huber*, 603 F.2d at 394 (noting in passing that the special verdict form helped show that jurors were undivided).[18]

Contrary to Ryan's position, there is no requirement that a district court use a defendant's proffered special verdict form, even in complex cases. *See United States v. Sababu*, 891 F.2d 1308, 1325 (7th Cir. 1989); *Smith*, 938 F.2d at 70; *see also United States v. Ogando*, 968 F.2d 146, 149 (2d Cir. 1992) (noting the benefits of special interrogatories in "particularly complex criminal cases," but finding their use within the "broad discretion of the district court" and affirming the district court's decision not to use special interrogatories submitted by the defendants). In *Sababu*, a conspiracy case, the Seventh Circuit rejected the defendants' argument

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[18] Other cases cited by Ryan are inapplicable. In *United States v. Beros*, 833 F.2d 455, 460-63 (3d Cir. 1987), the court concluded that a particularly complex case "warranted more specific instructions regarding jury unanimity," but did not address whether a special rather than a general verdict form should have been used. In *United States v. Ham*, 58 F.3d 78, 85 (4th Cir. 1985), the court expressed no opinion at all as to the district court's use of a special verdict form.

that special verdict forms were needed to ensure juror unanimity as to which conduct constituted the defendants' conspiracy: "The defendants provide us with no cases or other authority–and we can find none on our own–that require a district court to provide a jury with proffered special verdict forms." 891 F.2d at 1325. The court there found the unanimity requirement satisfied by an instruction that the jurors unanimously agree that the defendants were part of the conspiracy, and as to the objects of the conspiracy. *Id.* at 1326.

This court acknowledges that special verdict forms may be beneficial in certain complex criminal cases, and, as noted, the court was not opposed in principle to using such a form in this case. The court, however, found Ryan's proffered 68-page verdict form "cumbersome, overly detailed, and potentially confusing." 3/6/06 Order. Indeed, many of the factual findings that Ryan asked the jury to make had no apparent purpose. In light of the general disfavor of special verdict forms in this circuit, and given the lack of any requirement to use such forms, the court concluded that the potential for harm from Ryan's proffered form far outweighed any benefit from its use.

The court is satisfied that the general verdict forms returned by the jury adequately protected Ryan's right to a unanimous verdict. At the jury instructions conference, the court directed the government to modify its proposed general verdict form to include some factual detail as to each count of the indictment, to help the jurors identify the counts and to avoid confusion. The court accepted the government's revised version. In addition, as in *Sababu*, the court gave specific instructions on

unanimity in addition to the customary instructions that the verdict be unanimous and that every element of every offense be proved beyond a reasonable doubt. For example, for Counts Eleven and Twelve, alleging false, fictitious or fraudulent statements by defendant Ryan, the court instructed the jury that it must unanimously agree on which statement was false, fictitious, fraudulent. Final Jury Instr. at 109. In light of the additional information on the general verdict forms and the instructions on unanimity, the general verdict forms were sufficient.

D. The Court Properly Instructed the Jury With Respect to the RICO Conspiracy Offense

Defendant Ryan also argues that he was deprived of his right to unanimous juror agreement on every element of every offense because the court did not instruct the jurors that they must unanimously agree on which conduct constituted the predicate racketeering acts implicated in the RICO conspiracy charge (Count 1). Ryan Post-Trial Mot. at 60-61. The court disagrees.

Jury instructions, when viewed as a whole, must treat the issues fairly and accurately. *United States v. O'Malley*, 796 F.2d 891, 897 (7th Cir. 1986). In this case, the court utilized the Seventh Circuit pattern jury instructions for the section 1963(d) RICO conspiracy charge, which do not include any direction that jurors unanimously agree on which predicate acts gave rise to a pattern of racketeering activity. Fed. Crim. Jury Instr. 7th Cir. § 1962(d). The pattern instructions include unanimity instructions only for a substantive RICO charge under section 1963(c): "[Y]ou must unanimously agree as to which two or

more racketeering acts the defendant committed [or caused to be committed] in order to find the defendant guilty of that count. . . . [Y]ou must unanimously agree upon which of the different offenses alleged within a racketeering act the defendant committed." Fed. Crim. Jury Instr. 7th Cir. § 1963(c). There is a reason for the difference: a conspiracy charge under section 1962(d) focuses on the act of a defendant's agreement to engage in racketeering activity, rather than on the racketeering acts themselves. *United States v. Geicer*, 923 F.2d 496, 500 (7th Cir. 1991) ("Section 1962(d), like all conspiracy provisions, has as its target the act of agreement–here, the agreement to engage in activity that implicates section 1962(c)."). Thus, in *Geicer*, the Seventh Circuit held that specific predicate acts need not be alleged nor proved for a section 1962(d) charge. *Id.* Similarly, the Supreme Court in *United States v. Salinas*, 522 U.S. 52, 63-65 (1997) held that a defendant need not have actually committed nor even agreed to commit the two or more predicate racketeering acts required by section 1962(c) in order to be punished under section 1962(d); rather, all that is required is that the defendant "adopt the goal of furthering or facilitating the criminal endeavor." It would be anomalous to require jurors to unanimously agree on which predicate acts constituted the pattern of racketeering activity which was the object of the conspiracy, when the prosecution is not required to prove or even identify those predicate acts.

Ryan acknowledges that there is no Seventh Circuit authority that requires a unanimity instruction for a section 1962(d) charge. Ryan Post-Trial Mot. at 60. On the other hand, the Seventh Circuit has not squarely held that such an instruction

is *not* required. The Seventh Circuit has, however, upheld the use of juror instructions that lack an instruction requiring the jurors to unanimously agree on and identify particular predicate acts for a section 1962(d) charge. *See United States v. Campione*, 942 F.2d 429, 437 (7th Cir. 1991) (finding an instruction sufficient that defined "pattern of racketeering" as "at least two of the acts alleged" in 30 other counts of the indictment).[19] Moreover, as discussed above, the distinction between the substantive charge of section 1962(c) and the conspiracy charge of section 1962(d), recognized by both the Seventh Circuit in *Geicer* and the Supreme Court in Salinas, obviates the need for an instruction of unanimous juror agreement as to particular predicate acts under the conspiracy charge, even where, as in the pattern instructions, it might be given for the substantive offense.

Ryan relies on several cases from other circuits in which courts found no error when a unanimity instruction was given for a section 1962(d) charge. Ryan Post-Trial Mot. at 60--61. None of these cases, however, holds that such an instruction is required, and none holds that it should have been given when

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[19] The government cites *Campione* for the proposition that requiring a unanimity instruction would be "contrary to the law of the Seventh Circuit." (Gov't Resp. at 74.) As this court reads that case, however, *Campione* does not reach so far; indeed, the decision does not specifically address juror unanimity. Rather, at issue in *Campione* was whether the judge should have instructed the jury that members of the *conspiracy*–not the jurors–had to agree on which predicate acts the defendants intended to commit. 942 F.2d at 436. The case is thus relevant to the juror agreement issue not through a specific holding, but as precedent where the Seventh Circuit upheld jury instructions that lacked any direction that the jury identify and unanimously agree on specific racketeering acts.

it was not. In *United States v. Shenburg*, 89 F.3d 1461, 1472 (11th Cir. 1996), the court held that the district court did not abuse its discretion in declining defendants' request for a special verdict on a RICO conspiracy count. The court noted that the judge gave a unanimity instruction in addition to using a general verdict, but did not hold that such an instruction was required; moreover, nowhere did the court state that the use of a predicate unanimity instruction is a prerequisite when a general verdict form is used. *Id.* Similarly, the court in *United States v. Smith*, 413 F.3d 1253, 1277 (10th Cir. 2005) noted that the district court instructed the jurors to agree on two of the same racketeering acts, but again the precise issue was whether the judge should have used a special verdict form naming each predicate act. And in *United States v. Merlino*, 310 F.3d 137, 139–140 (3d Cir. 2002), the district court gave a specific unanimity instruction, but the court never addressed the propriety of that instruction; rather, the issue was whether the jurors' failure to agree that a particular predicate act was proved constituted an "acquittal" that barred subsequent prosecution based on that act. Moreover, both *Shenburg* and *Merlino* contained a substantive section 1962(c) RICO charge in addition to the conspiracy charge. *See Shenburg*, 89 F.3d at 1469; *Merlino*, 310 F.3d at 139. In this case, of course, Defendants were not charged with the substantive offense. The court thus finds the cases cited by Ryan unpersuasive, especially in light of the Seventh Circuit and Supreme Court authority discussed above.

Ryan further argues that in declining to dismiss the RICO charge in 2004, this court "relied" on the government's representation that it would seek a

predicate unanimity instruction, and that the court was thus bound to give such an instruction. Ryan Reply at 26. The court did not, however, refuse to dismiss the RICO charge solely on the basis of the government's intent to seek a predicate unanimity instruction. The court rejected Defendant Warner's contention that the indictment failed to adequately identify specific predicate racketeering acts because the rule in the Seventh Circuit is that such specificity is not required. 8/11/04 Order at 32-33; *see Glecier*, 923 F.2d at 501 (holding that a RICO conspiracy charge indictment need not identify specific predicate acts in which the defendant was involved). Whether the government's decision not to later seek the instruction was "patently unfair," as Ryan claims, Ryan Reply at 26, is irrelevant to the sufficiency of the indictment. The indictment was either legally sufficient or it was not, and in concluding that it was sufficient, the court did not obligate itself to give any particular jury instruction. Just as the sufficiency of the indictment was evaluated on its merits, so too is the issue of whether a unanimity instruction is required; the two are not necessarily intertwined.

The court concludes that the jury instructions given for the RICO conspiracy charge fairly and accurately state the law. In any event, even if the law indeed requires a unanimity instruction for predicate racketeering acts under section 1962(d), the lack of such an instruction in this case was harmless. Where a defendant is charged with substantive offensives that are also alleged as RICO predicate racketeering acts, a finding of guilt on two or more of the substantive offenses is sufficient to support a RICO conviction. *United States v. Anderson*, 809 F.2d 1281, 1284 (7th Cir. 1987). *Anderson*, cited by neither the

government nor Defendants, appears directly on point. There, the alleged RICO predicate acts also formed the basis for three Hobbs Act counts and one mail fraud count, on all four of which the defendants were convicted. *Id.* at 1283. One defendant argued, as does Ryan, that the RICO conviction could not stand because it was impossible to tell which of the four offenses the jury viewed as predicate acts. *Id.* at 1284. Affirming the conviction, the court held that because the jury had unanimously found the defendants guilty of each of the four acts, it was irrelevant on which of the acts the jury relied: "[T]he jury could property rely on any two or more of the four substantively charged offenses as a matter of law." *Id.* at 1284.

Here, the jurors unanimously found Defendants Ryan and Warner guilty on multiple counts of mail fraud, each of which constitutes a distinct predicate racketeering act. See 28 U.S.C. § 1961(1) (any violation of the federal statutes related to mail fraud amounts to a racketeering act under RICO). Defendants' concern over juror unanimity is thus misplaced, as there is no question that the jury unanimously found that Defendants committed two or more racketeering acts that constitute the required pattern of racketeering activity under RICO.

VIII. THE COURT PROPERLY EXCLUDED CERTAIN EVIDENCE OF RYAN'S GOOD FAITH

Defendant Ryan argues that "[t]he [c]ourt excluded evidence directly relevant to Ryan's good-faith defense, but freely admitted the same type of evidence when the government offered it to prove Ryan's bad faith." Ryan Reply at 27. This evidence

relates to the decisions of other secretaries of state to increase fees chargeable by currency exchanges, as well as the renewal of certain leases and contracts negotiated by Ryan. Ryan also objects to the exclusion of his policy decisions on such remote issues as the death penalty, gay rights, gun control, organ donation, and drunk driving. Ryan Post Trial Mot. at 61–64.

Mail fraud is a specific intent crime, *United States v. Henningsen*, 387 F.3d 585, 590-91 (7th Cir. 2004), for which the absence of an intent to defraud is a complete defense. *United States v. Ashman*, 979 F.2d 469, 480 (7th Cir. 1992). As such, Ryan was most certainly entitled to introduce evidence of his good faith, *United States v. Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1982) ("The defendant is entitled to present evidence concerning his beliefs, motives, and intentions regarding the various transactions and mailings in the alleged scheme to defraud."), but circuit precedent does "not require that any evidence, no matter how tangential, irrelevant or otherwise inadmissible, must be admitted simply because the defendant claims that it establishes his good faith." *United States v. Longfellow*, 43 F.3d 318, 321-22 (7th Cir. 1994).

To begin, Ryan takes issue with this court's decision to allow the jury to hear evidence that Ryan approved a currency exchange rate increase in 1995, Tr. at 2852–53 (09/29/05), but to deny the introduction of evidence of larger and more frequent increases in that rate by previous and subsequent secretaries of state. Order of 10/31/05 at 8. The government notes that the court did allow Ryan to introduce evidence that Ryan *actually considered* his predecessor, then-Secretary of State Jim Edgar's

1982 and 1985 rate increases, in Ryan's own 1995 decision. *Id.* at 6. Moreover, Ryan availed himself of this decision, putting such evidence before the jury in the form of Georgia Marsh's 1992 memo to Ryan, for instance. That memo reflected that the last rate increase took place some seven years prior; that Edgar had approved, but never enacted, a subsequent increase; that the currency exchange industry was economically important; and that a rate increase prior to the 1994 election might be politically difficult. Tr. at 4762-65 (10/19/05). The government portrayed Ryan's single 1995 decision to raise rates during his eight years as Secretary of State as highly unusual and suspicious in spite of this evidence, Tr. at 23085 (03/07/06), but inviting the jurors to give greater weight to some evidence and lesser weight to other evidence is well within the bounds of a fair prosecution.

Ryan's intentions and beliefs with regard to the 1995 exchange rate increase are of course relevant because the Indictment alleges that Ryan approved the rate increase in exchange for resort packages in Jamaica as part of a scheme to defraud the State of Illinois. That said, the naked act of some other official, whether he preceded or followed Ryan in office, does not shed any light on what Ryan himself intended when he took that same act, absent evidence that Ryan actually considered the other official's act. The decisions of Ryan's successor, Secretary of State Jesse White, could not have influenced Ryan in 1995 as all White's acts necessarily post-date Ryan's tenure.[20]

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[20] Much the same can be said for Ryan's contention that the court improperly excluded evidence of Secretary White's renewal

Finally, this court excluded evidence regarding Ryan's moratorium on the death penalty among other policy positions. Tr. at 14197 (01/03/06); Tr. at 19396 (02/08/06). The court found Ryan's substantive political positions to be completely unrelated to the leases and contracts at issue in the Indictment. That Ryan occupied his day with political decisions other than those charged in the Indictment, making it less likely that he had time to participate in a conspiracy or scheme to defraud the state, is relevant to his defense in a manner that the underlying merits of those political decisions is not. Ryan wanted to introduce his policy decisions on other issues of the day in order to convey to the jury that the portrait painted by the indictment was inconsistent with a man who took such courageous positions, but "'[e]vidence of other . . . acts is not admissible to prove the character of a person in order to show action in conformity therewith.'" *Warner*, 396 F. Supp. 2d at 940 (citing FED. R. EVID. 404(b)).

IX. JUROR ISSUES

Defendants contend that significant juror misconduct before trial, during trial, and during deliberations deprived them of their right to an impartial jury. The court concludes that both Defendants significantly overstate the degree of juror misconduct in this case. This also undermines their contention that, taken together, individual incidents of juror misconduct or plain bad judgment lead to the conclusion that the twelve jurors who deliberated to

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of the facilities Ryan leased during his tenure in that office. Tr. at 11062-67 (12/05/05). The decision to renew a lease is, moreover, one influenced by many factors other than the decision to enter into a lease in the first place.

verdict in this case were incapable of following this court's instructions. On the contrary, this court concludes that, in spite of the difficulties generated by this very lengthy, high-profile trial, these jurors were diligent and impartial. For the reasons discussed below, the court denies Defendants' motions for new trials based upon the conduct of the jurors in this case.

A. Alleged Juror Misconduct During *Voir Dire*

The parties in this case developed a written juror questionnaire containing 110 numbered questions. Under a section entitled "Criminal Justice Experience," prospective jurors were asked whether they, or their family members or close friends, had been involved in prior criminal proceedings. Question 82 asked whether the prospective juror or a close friend or relative had "ever been charged with or accused of a crime." Question 84 asked whether the prospective juror had ever "had to appear in court, or been involved in any lawsuit or court proceeding as a plaintiff, defendant, victim, or witness." After the case was submitted to the jury, the court discovered that a number of jurors had failed to disclose certain criminal matters on their juror questionnaires.

Background checks of Jurors Pavlick and Ezell, ordered by this court after it became aware that a local newspaper was investigating these jurors, Tr. at 24223, 24237 (03/23/06), disclosed a number of troubling arrests and convictions. Juror Pavlick was convicted of multiple DUI offenses, culminating in a felony DUI conviction, and a misdemeanor weapons conviction. Tr. at 24288–89 (03/24/06). Mr. Pavlick's DUI conviction occurred while Defendant Ryan was

Secretary of State, raising the specter of bias. *Id.* at 24290, 24293. Juror Ezell's background check revealed several criminal arrests, including arrests for assault, battery and possession with intent to deliver cocaine, and an outstanding warrant for driving on a suspended license. *Id.* at 24276–77, 24306. At least one of Ms. Ezell's arrests was under the name of an alias. *Id.* at 24303–05. The court also discovered that Ms. Ezell's daughter had a number of arrests and convictions. *Id.* at 24273. Neither juror disclosed these incidents on their juror questionnaires, and the court questioned both jurors about these omissions. Although neither juror admitted to deliberately omitting their criminal backgrounds from the questionnaire, the court concluded that their responses were not credible in certain respects, and that truthful answers to the questions would have supported excusing them for cause. See Tr. at 24296, 24479–80 (03/27/06). Both Mr. Pavlick and Ms. Ezell were excused from the jury.

The revelations concerning Jurors Pavlick and Ezell prompted defense counsel to request additional background checks of the remaining jurors and alternates. Tr. at 24286 (03/24/06). Warner argues that information revealed by these background checks indicated that Jurors Chambers, Svymbersky, Casino and Rein, all of whom deliberated to verdict, were biased. Warner Post-Trial Mot. at 16, 18.[21]

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[21] Juror Gomilla had neglected to disclose a bankruptcy proceeding, but her explanation was fully satisfying to the court. Because Juror Talbot had in fact disclosed certain additional information, not recorded in his questionnaire, during voir dire, the court found no colorable basis for questioning his

Defendant Ryan contends that this court applied "arbitrary criteria" to determine which jurors to retain and which to dismiss when irregularities in their questionnaire responses came to light. Ryan Post-Trial Mot. at 22.

The Supreme Court has articulated a two-part test to determine whether, after the jury has reached a verdict, a juror's response to *voir dire* questions requires a new trial: "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).[22] The focus of the inquiry is whether the juror's dishonest answer demonstrates actual or implied bias, *United States v. Polichemi*, 219 F.3d 698 (7th Cir. 2000), because whatever motivated the juror's misrepresentations, "only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough*, 464 U.S. at 555–56. The court believes that the circumstances surrounding each of the challenged jurors warranted different treatment than either Mr. Pavlick or Ms. Ezell. With respect to each of the retained jurors, the count concluded that they did not answer the juror questionnaire dishonestly, and even if they had, a "correct answer" to the questions at issue would not

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qualifications to continue service on the jury. The court chose not to seat alternate Juror Masri on the reconstituted jury.

[22] Accordingly, Defendant Warner's argument that the jurors' "conceal[ment]" prevented him from intelligently exercising his peremptory challenges would not, even if it accurately characterized the jurors' conduct, warrant a new trial. Warner Post-Trial Mot. at 16; *see McDonough*

provide "a valid basis for a challenge for cause." *Id.* at 556.

1. Juror Chambers

Question #84, in the section of the questionnaire entitled "Criminal Justice Experience," asked whether the jurors had ever had to appear in court or been involved in any lawsuit or court proceeding "as a plaintiff, defendant, victim, or witness." Juror Chambers answered "no," although she and her husband initiated divorce proceedings in 2004 and both she and her husband had moved for orders of protection. Ryan points out that potential jurors "included an assortment of legal matters," including divorce, in their responses to Question #84. *See* Ryan Group Exhibit C; Ryan Post-Trial Mot. at 41 n.20. But as the government points out, the question elicited a wide variety of answers indicating multiple interpretations. Gov't Resp. at 89. Juror questionnaires were completed by 301 prospective jurors, and 46 disclosed that they were divorced. *See* Ex. 8 to Gov't Resp; *see also* Juror Questionnaire, Question #7 (asking prospective jurors about their marital status). Of those 46 prospective jurors, only six listed their divorce proceedings in response to question #84. *See* Ex. 9 to Gov't Resp. Juror Chambers was, it appears, in good company in believing that question #84 was not asking about divorce actions.[23] When asked by the court prior to

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[23] Defendant Ryan refers to the government's analysis as a "tortured exegesis of the juror questionnaire," but does not dispute the accuracy of the government's review. Ryan Reply at 20. Moreover, Ryan himself took the position that the responses of other jurors should be compared with those of Ms. Chambers to determine her credibility. Ryan Post-Trial Mot. at 41 n.20.

the jury returning its verdict why she did not disclose either her divorce proceedings or the orders of protection, she stated that she believed the question referred to experience in criminal proceedings only. Tr. at 25407–08 (04/17/06). This court credited her response, *Id.* at 25418–19, and is not persuaded by the Defendants to revisit its credibility determination, particularly in light of the variety of responses that question #84 elicited from other prospective jurors.

The government points out, further, that eight of those potential jurors who did not list their divorce actions in response to question #84 were questioned by both parties during *voir dire*. Gov't Resp. at 90. Defense counsel did not investigate this purported discrepancy with any of those eight jurors, much less argue that it was a basis to remove those jurors for cause. Yet the aspersions that the Defendants cast on Juror Chambers and the other jurors who deliberated to verdict in this case—that they were untruthful, that they were looking for their 15 minutes of fame—would apply equally to these other potential jurors under Defendants' theory. More importantly, the court is not persuaded that a "correct answer" to question #84, disclosing all of Juror Chambers' court experience stemming from her marital difficulties, would have been a sufficient basis for a cause challenge. Absent some nexus with the particular Defendants in this case, divorce proceedings do not rise to the level of presumed or actual bias. Again, this conclusion is borne out by the way that the Defendants conducted *voir dire*. Many potential jurors disclosed their divorced status, yet Defendants' counsel did not ask whether their experiences

affected their impression of the justice system or otherwise investigate potential bias.

2. Juror Svymbersky

Juror Svymbersky failed to disclose a 23-year-old misdemeanor charge for purchasing a stolen bicycle, even though it was relevant to questions #82 ("[h]ave you . . . ever been charged with or accused of a crime?") and #84. When Mr. Svymbersky was brought into chambers to discuss the omission, he volunteered that the incident had occurred and described what had happened. Tr. at 24543 (03/27/2006). When asked why he had not listed the incident in response to question #82, Juror Svymbersky at first stated that he thought the charges had been "dropped," and that they would "not show up on any records." Tr. at 24545, 24559 (03/27/2006). He later clarified that this was not a contemporaneous rationale for leaving it off his questionnaire: the incident had not occurred to him at all as he was completing the questionnaire. *Id.* at 24559–60. Only later, when he learned from someone at work that jurors were being investigated, did he recall the incident. *Id.* Defense counsel maintained at the time, and Warner continues to maintain, that Juror Svymbersky equivocated. *Id.* at 24568; Warner Post-Trial Mot. at 3. This court initially expressed some doubt about Juror Svymbersky's explanation, as well (see Tr. at 24572 (03/27/2006), but ultimately found his responses to be credible. *Id.* at 24759. The incident was minor and occurred when Juror Svymbersky was very young, only 18 or 19 years old. The court believed then, as it believes now, that Juror Svymbersky honestly did not think about the misdemeanor when confronted with question #82, and did not deliberately omit the incident when he completed his questionnaire.

Accordingly, the first prong of *McDonough* has not been met. *See McDonough*, 464 U.S. at 555 ("To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give."). Even assuming that he had answered dishonestly, the court does not believe that a 23-year-old misdemeanor charge would have supported dismissing Mr. Svymbersky for cause. The notion, advanced by Defendant Ryan, that this charge is indistinguishable from Mr. Pavlick's felony DUI conviction (occurring, no less, during George Ryan's tenure as Secretary of State), or Ms. Ezell's numerous more-recent arrests for very serious crimes, is unpersuasive.

3. Juror Casino

Juror Casino was arrested three times in the early to mid-1960s for carrying a concealed weapon (1961), a DUI misdemeanor (1962), and misdemeanor assault (1965). Tr. at 24648 (03/28/2006). So far as the available records indicate, only the DUI misdemeanor resulted in a conviction. *Id.* When asked by this court why he did not disclose these arrests on his questionnaire, Mr. Casino stated that he had forgotten that they had ever occurred. *Id.* at 24649, 24743–44. This court concluded that Mr. Casino's explanation was credible, exceedingly so. *Id.* at 24745. Nothing in the Defendants' post-trial briefs persuades the court otherwise. Moreover, the court would be hard-pressed to conclude three misdemeanor arrests (and one conviction), each more than 40 years old, would bias Mr. Casino against the Defendants in any respect.

4. Juror Rein

In 1980, Mr. Rein was arrested for assaulting his sister, who, unbeknownst to Rein, was at that time three-months pregnant. Tr. at 24626, 24628 (03/27/2006). Mr. Rein did appear in court in connection with this incident, though he believed the matter had been expunged. *Id.* at 24630–31.[24] When asked why he did not disclose this incident on his questionnaire, Mr. Rein explained: "I really don't think I even thought of it. I wasn't even thinking about the fact that it was even supposed to be on the record." *Id.* at 24631. This court concluded that Mr. Rein's explanation was credible, *Id.* at 24742, and is not now persuaded that he was dishonest. Nor is the court persuaded that a two-decades old assault arrest, standing alone, would support a challenge for cause. Ryan greatly, and, the court believes, irresponsibly, exaggerates the severity of the incident in his post-trial brief. Ryan Post-Trial Mot. at 23. Certainly, there is no indication that the domestic

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[24] Mr. Rein first stated that he did not "have to go to court" as a result of his assault arrest, stating that it "[n]ever got that far." Tr. at 24629–30. He later stated during the same *voir dire* that he met with a judge in the DuPage County courthouse while the judge was eating lunch. Tr. at 24630. Defendant Ryan seizes upon this apparent discrepancy, Ryan Post-Trial Mot. at 23, but it appears to the court that Mr. Rein distinguished "going to court," which may very well indicate a full trial or hearing to a layperson, from the informal meeting he recalls having with the judge. Defendant Ryan also points out that Rein acknowledged that his failure to include the assault arrest on his questionnaire was "untruthful." *Id.* It is clear to the court, however, that Rein meant that his questionnaire response was "inaccurate," not that he deliberately omitted an item he knew to be responsive.

dispute Mr. Rein described in any way indicated that Rein could not deliberate impartially in this case.

B. Alleged Juror Misconduct Prior to Deliberations

1. Jurors did not prematurely discuss the evidence

Defendant Ryan contends that the jurors improperly discussed evidence during the pendency of the trial. On December 21, 2005, Juror Jones alerted the court that she overheard Juror Pavlick comment that Nancy Smith, Ryan's mother-in-law's caretaker and a government witness, "wasn't paid nearly enough for her service, she's a home caregiver and which those people are, you know, have a history of being underpaid." Tr. at 13988–89 (12/22/05). The court questioned some of the jurors in chambers and learned that Juror Pavlick's comment led to a discussion of "home health care workers" which Jurors DiMartino, Ezell and Svymbersky either participated in or overheard. Juror Jones and Juror DiMartino asked these jurors to stop talking as they believed the conversation was not appropriate and "could have led somewhere else." *Id.* at 13989 (12/22/05). Although their recollections of the discussion varied, all of the jurors questioned stated that the incident would not affect their ability to decide the case impartially. *Id.* at 13993–94, 14000, 14143, 14153. The amount Ms. Smith was paid, whether it was a lot or a little in proportion to the services that she rendered, was not an issue in this case. After thoroughly investigating the matter, this court again admonished the jurors not to discuss the evidence, Tr. at 4163–64 (12/22/05), and the court is not aware of any circumstances indicating that the

jurors failed to follow that instruction thereafter. The court does not believe that this isolated and innocuous incident prejudiced the Defendants.

Defendant Ryan also asserts that Juror Rein must have engaged in premature deliberations, because "he had formed an opinion about another juror's views in comparison with his already-formed opinion and interpretation of the evidence." Ryan Post-Trial Mot. at 43. This argument is predicated on an untenable interpretation of Juror Rein's statements to the court concerning another juror's attentiveness. The fact that Mr. Rein thought about the *process* of deliberations during the trial is no indication that he had prematurely reached conclusions about the evidence or formed opinions about how his fellow jurors might rule. The court is cognizant of the dangers of premature deliberation outlined by Defendant Ryan, Ryan Post-Trial Mot. at 44 (citing *United States v. Resko*, 3 F.3d 684, 689 (3d Cir. 1993)), but has no difficulty concluding that they were not implicated in this case.

2. The court properly dismissed Juror McFadden

Defendant Warner contends that this court improperly removed Juror McFadden. On numerous occasions over the course of the trial, individuals, including this court and counsel for both parties, observed Ms. McFadden nodding off or fully asleep. *See, e.g.*, Tr. at 15082, 15237 (01/09/06) (Two jurors report, consistent with the court's own observations, that Ms. McFadden is "nodding off a great deal;" they also report that "sometimes she actually snored"); Tr. at 17285 (01/23/06) (observed nodding off); Tr. at 19589 (02/09/06) (jurors request instruction about not

sleeping; court notes observing Ms. McFadden "completely asleep"); Tr. at 20045–47 (02/14/06) (government and Ryan's defense team observe McFadden asleep); *Id.* at 20047 (court observes McFadden asleep for five minutes). On February 21, 2006, the court, with counsel for both side present, spoke with Ms. McFadden about the problem, and discovered that in December 2005–months after the trial began–Ms. McFadden was diagnosed with diabetes. As of February 21, McFadden was not taking any medication for the condition (she explained that her doctor expected to address that possibility at a forthcoming appointment), and she acknowledged that fluctuations in her blood sugar rendered her drowsy from time to time. Tr. at 21009–10 (02/21/06). Ms. McFadden's inability to remain attentive during the trial, though no fault of her own, led this court to dismiss her from jury service.

Contrary to Warner's argument, the Seventh Circuit's decision in *United States v. Freitag*, 230 F.3d 1019 (7th Cir. 2000) did not obligate this court to retain Ms. McFadden. On the contrary, the trial court "has considerable discretion in deciding how to handle a sleeping juror." *Id.* at 1023. Based in part on its own observations of Ms. McFadden, and based on her medical condition, this court concluded that it was impossible for her to perform her duties. *Id.* *Freitag* differs from the instant case in that, here, defense counsel wanted to retain this inattentive juror. *See, e.g.*, Tr. at 19877 (02/13/06). This court does not require defense counsel's consent to remove an inattentive or otherwise incompetent juror prior to deliberations. *See, e.g.*, *United States v. Upshaw*, 114 Fed. Appx. 692, 711 (6th Cir. 2004) (*vacated on other grounds by United States v. Booker*, 543 U.S. 220

(2005)) ("It is within the trial court's prerogative to substitute for reasonable cause any juror with an alternate, even without consent of either party to the case."); *United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993) ("So long as the substitution takes place prior to deliberations, it is within the prerogative of the trial court and does not require the consent of any party.") (citation and internal quotation marks omitted). The court concludes that it properly removed Ms. McFadden.

One other circumstance surrounding Ms. McFadden's dismissal requires comment. On January 23, 2006, Juror Rein notified the court that he and some of his fellow jurors observed Ms. McFadden reading a novel during testimony. Tr. at 17284 (01/23/06); *see also* Tr. at 9384 (11/22/05) (same juror observing Ms. McFadden doing a crossword puzzle during the trial). With counsel present in chambers, Mr. Rein reported his observation to the court, and made the following comment:

> I mean I would just think, knowing the times that she's nodded off and then just wondering how much she's been paying attention if -- and assuming we'd both be on the final jury and in deliberations, I know that I'm supposed to respect her opinion, but how can I, you know, it would be awfully hard to -- I mean I remember the interviews before the trial, you know, if it's 11 to 1, can you hold off?
>
> Well, if she was that one, I think I'd be so angry because we'd be, like, what are you basing your opinion on? You just get the feeling she hasn't really paid as much attention as the rest of the people.

Tr. at 17285–86 (01/23/06). Defendant Ryan contends that this statement, together with statements Juror Rein made to the media after the trial, are evidence that he was unwilling to deliberate "with jurors of different, dissenting viewpoints." Ryan Post-Trial Mot. at 41. Mr. Rein's post-verdict statements to the media are not competent evidence, *see* FED. R. EVID. 606(b), and the court is not persuaded by Ryan's strained interpretation of Rein's statement. Ryan contends that the phrase "11 to 1" somehow conveyed Mr. Rein's or Ms. McFadden's leanings prior to the close of evidence. The plain import of Mr. Rein's statement is that he believed that one of his fellow jurors was not paying close attention, and further believed that this was affecting the morale of the other jurors, himself included. Tr. at 17285 (01/23/06). Rein's concern about the possibility of a holdout juror (likely generated by questions posed by defense counsel during *voir dire*) was plainly hypothetical. There is no reasonable basis to conclude that this statement indicates that Juror Rein prematurely deliberated, or was unwilling or unable to fairly deliberate.

C. Alleged Juror Misconduct During Deliberations

1. Extraneous documents consulted by the jurors during deliberations did not prejudice Defendants

(a) Background

Several days after deliberations began, the court was alerted to a conflict among the jurors. On September 20, 2006, the court received a note from one of the jurors, Evelyn Ezell, stating that the other jurors had been insulting her "for the last couple of

days." Tr. at 24053 (03/20/06). In a brief written response, the court admonished the jurors to treat one another with "dignity and respect," despite their disagreements. *Id.* at 24055. Two days later, the court received a note drafted by Juror Losacco and signed by eight other jurors. Tr. at 24074–76 (03/22/06). Ms. Losacco and the other signatories to the letter claimed that Ms. Ezell refused to deliberate or consider the evidence, and further that she was verbally and physically aggressive. *Id.* In response to this note, the court reiterated that the jurors must treat each other with dignity and respect, and instructed them in writing that they deliberate together, and only in the jury room. Letter from Court to Jurors of 3/23/06. Each of the twelve jurors received an identical copy of this letter.

As previously discussed, Jurors Ezell and Pavlick were removed from the jury for reasons wholly unrelated to this conflict on March 27, 2006, shortly after the court received Ms. Losacco's note. The reconstituted jury was convened and instructed the following day, and returned a verdict on April 17, 2006. Approximately one week after the verdict was announced; Ms. Ezell alleged in a television interview that another juror, later identified as Ms. Peterson, had brought into the jury room extraneous materials that Ms. Ezell referred to as "case and law." See NBC Television Broadcast, Ex. 1 to Ryan's Post-Trial Mot. Defense counsel brought Ms. Ezell's statements to the court's attention the next day, and the court held an informal evidentiary hearing on May 5, 2005 to investigate Ms. Ezell's claims. At that hearing, Ms. Ezell testified by telephone that during the original jury's second week of deliberations, Juror Peterson had, in the presence of all the other jurors, read to

Ms. Ezell from a sheet of paper words to the effect that a juror could be dismissed if he or she failed to deliberate in good faith. Tr. at 10–12 (05/05/06). According to Ms. Ezell, Ms. Peterson referenced "section" numbers as she read aloud, but Ms. Ezell could not recall specifics. *Id.* at 12. She further testified that when Ms. Peterson finished reading, Juror Losacco told Peterson to "read the one to her [Ms. Ezell] on bribery, because George Ryan was taking bribes and so are you. Because the only way you can vote the way you're voting is you've got to be getting paid." *Id.* By that time, according to Ms. Ezell, she and Juror Davis were crying, and when Ms. Ezell attempted to leave the jury room, Juror Cwick stood in the doorway to prevent her from exiting. *Id.* at 13. Mr. Davis also reportedly told Ms. Ezell to "watch [her] back." *Id.* at 12.

The court had some concern about the credibility of this allegation, which surfaced for the first time weeks after the episode allegedly took place, but concluded that at least brief investigation was appropriate. With counsel present, the court contacted Ms. Peterson by telephone and obtained from her the two documents that she acknowledged having brought into the jury room. In a telephone conference, Ms. Peterson testified that on March 20, 2006, the day prior to the confrontation that Ms. Ezell described, Ms. Peterson had brought into the jury room a two-page document from the American Judicature Society ("AJS"), entitled "Use of alternate jurors," that she obtained from an Internet search on March 17, 2006. *Id.* at 77. The first page of the document is largely devoted to juror-substitution mechanics; the last paragraph on the second page discusses dismissing jurors who are "unwilling or

unable to meaningfully deliberate." AJS Article, Ex. 2 to Ryan Post-Trial Mot. Ms. Peterson showed the full document to "a few people" that day—she was certain that she showed it to Jurors Talbot and Pavlick, and less certain that she had shown it to Jurors Losacco, Cwick and Gomilla. *Id.* at 82. That evening, she cut out a portion of the document with pinking shears and brought it with her the next morning to the jury room. *Id.* at 80–81. On March 21, 2006, Ms. Peterson testified that she read the AJS excerpt to Ms. Ezell in the presence of the other jurors. *Id.* at 77–78. The excerpted paragraph states as follows:

> . . . personal hardship. But other bases for substitution raise serious issues about the sanctity of the deliberative process, primarily allegations by some jurors that another juror is unwilling or unable to meaningfully deliberate, or is unwilling to follow the law. Such an allegation requires a hearing where the judge must decide the tricky question whether the juror is truly unfit to serve, or is merely expressing an alternate viewpoint that will likely result in a hung jury. Only if the judge concludes that the challenged juror is truly unfit to serve, will the judge be authorized to dismiss that juror and substitute an alternate juror.

AJS Excerpt, Ex. 2 to Ryan Post-Trial Mot. The second document that Ms. Peterson brought into the jury room was a handwritten statement that Ms. Peterson herself wrote in pencil on a piece of paper that she had torn out of a paperback novel she had been reading on the commuter train. *Id.* at 78. Ms. Peterson's handwritten note stated as follows:

> You have the right to speak your opinion but you have responsibility [sic] to use the facts the testimony [sic] to seriously consider. If you don't use evidence and testimony to support your opinion your [sic] not being responsibly [sic].

Handwritten Note, Ex. 2 to Ryan Post-Trial Mot. Ms. Peterson's attorneys, who also participated in the May 5 hearing, represented that the handwritten note contained "her thoughts" about Ms. Ezell's responsibility as a juror. Tr. at 62, 66 (05/05/06). Ms. Peterson testified that she read this note to Ms. Ezell "maybe two or three times." *Id.* at 79. Consistent with Ms. Losacco's earlier note, Peterson testified that Ms. Ezell stated repeatedly that she was not required to deliberate or consider the evidence. *Id.* at 78–79. On two or three of those occasions, Peterson read her handwritten note to Ms. Ezell—only once did she read from the American Judicature Society article. *Id.* In contrast to Ms. Ezell's version of events, however, Ms. Peterson testified that Ms. Losacco did not tell her to "read the one about bribery," *Id.* at 83, although Peterson did recall a "couple people" asking Ms. Ezell on other occasions questions to the effect of: "[a]re you taking a bribe?" *Id.* at 84, 88–89. Ms. Peterson adamantly denied that there was any emotional reaction on the part of any jurors to her reading these materials to Ms. Ezell.

(b) Extraneous influence does not require a new trial

The Defendants contend that their right to an impartial jury was violated when Ms. Peterson read from the AJS article and her handwritten note during deliberations. Ryan Post-Trial Mot. at 3; Warner Post-Trial Mot. at 6–7, 19. Ryan further asserts that

his right to have counsel present "at every 'critical stage' of the proceedings" was violated by the handwritten "instruction" that Juror Peterson crafted and read aloud to the Ms. Ezell. Ryan Post-Trial Mot. at 3 (citing *Iowa v. Tovar*, 541 U.S. 77, 87 (1955); *United States v. Neff*, 10 F.3d 1321, 1324 (7th Cir. 1993)).

A new trial "is not automatically required whenever a jury is exposed to material not properly in evidence." *United States v. Sababu*, 891 F.2d 1308, 1333 (7th Cir. 1989). The question is whether there is a "reasonable possibility" that extraneous documents may have affected the verdict. *United States v. Bruscino*, 687 F.2d 938, 940 (7th Cir. 1982). This inquiry is "objective" and "fact-driven," *United States v. Genova*, 187 F. Supp. 2d 1015 (N.D. Ill. 2002), *aff'd in part and rev'd in part on other grounds*, 333 F.3d 750 (7th Cir. 2003) (citation and internal quotation marks omitted), and in making its determination this court may rely on its "familiarity with the proceedings when deciding whether the verdict was affected by outside information." *United States v. Sanders*, 962 F.2d 660, 668 (7th Cir. 1992). Prejudice to the defendants is presumed, *Remmer*, 347 U.S. at 229, but is rebutted if there is "no 'reasonable possibility' that the verdict was affected by the contact." *Sanders*, 962 F.2d at 668.[25]

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[25] In his opening brief, Ryan states that the government is required to prove that the extraneous influence on the jury was harmless "beyond a reasonable doubt." Ryan Post-Trial Mot. at 9, 46. Although *Remmer* describes the government's burden as "heav[y]," 347 U.S. at 229, the Seventh Circuit has not interpreted that case to require the government rebut the presumption by any particular "quantum of proof." *Evans v. Young*, 854 F.2d 1081 (7th Cir. 1988).

Although Defendant Ryan insists that, without interviewing every juror, the government cannot meet its burden, Ryan Post-Trial Mot. at 14–15, such a requirement is contrary to the objective nature of the court's inquiry. Interviewing additional jurors about the "emotional impact" of the extraneous materials, Ryan Post-Trial Mot. at 15, 46, or the confrontation with Ms. Ezell, is neither required nor appropriate. *See United States v. Paneras*, 222 F.3d 406, 411 n.1 (7th Cir. 2000); *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (7th Cir. 1991). In *United States v. Rutherford*, 371 F.3d 634 (9th Cir. 2004), a tax prosecution, a juror testified that IRS agents had glared and stared at jurors during the trial. In concluding that these circumstances warranted investigation of the impact this conduct had on the jurors, the Court of Appeals emphasized "the perceived, as well as actual, power that government actors have at their disposal and the positions of authority that they occupy." *Id.* at 643. In this case, in contrast, the "extraneous" influence came from a fellow juror; no conduct of any government agents is at issue here.

Moreover, the court is satisfied that its May 5, 2006 evidentiary hearing sufficiently revealed the factual circumstances surrounding Ms. Ezell's post-verdict allegations. 05/04/06 Order at 2–3; *see Evans*, 854 F.2d at 1084 ("The trial courts retain wide latitude over how to conduct such hearings. . . ."). At that hearing, Ms. Ezell testified that Ms. Peterson read aloud from a sheet of paper, although she only recalled portions of what Ms. Peterson read: "when a juror refuses to deliberate" and "a juror could be dismissed for not deliberating in good faith." Tr. at 11–12 (05/05/06). Ms. Peterson confirmed that she

brought extraneous documents into the jury room and read them to Ms. Ezell. She in fact retained the originals of these materials and furnished them to the court. The court is satisfied that Ms. Peterson has provided the court with all the materials that she consulted, and that any references to or allegations of bribery during deliberations were not made in connection with extraneous materials.[26]

Ryan insists that the nature of Internet searches is such that Ms. Peterson necessarily would have been exposed to other materials online. Ryan Reply at 3. But it is clear from Ms. Peterson's testimony that only the AJS article, indeed only a portion of that article, was relevant from her perspective. *See* Tr. at 80–81 (05/05/06). She further stated at the hearing that she avoided publicity about the case, and that she did not believe that the AJS article was "about" the case. *Id.* at 81. Significantly, even though defense counsel were present and were permitted to pose questions to Ms. Peterson during the May 5 hearing, counsel chose not ask about what other materials Ms. Peterson may have seen in her Internet search. *Id.* at

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[26] Defendant Ryan filed a supplement to his post-trial brief attaching a newspaper article, dated June 2, 2006, in which Ms. Ezell claims to have discovered a document on the Internet that she believes is the document Ms. Peterson read aloud to the jurors. Ex. 1 to Supplement to Ryan's Motions for Judgment of Acquittal, New Trial, and Arrest of Judgment. According to the article, this document contains "section" references, consistent with Ms. Ezell's recollection. The court is not persuaded that this latest article warrants any further investigation of Ms. Ezell or any other juror. Ms. Ezell's speculation, surfacing almost a month after the court and counsel for both sides interviewed Ms. Ezell and Ms. Peterson, is insufficient grounds to reopen an inquiry into events that have already been fully investigated.

93. In any event, the court does not believe that Ms. Peterson was exposed to any other materials relevant to the court's inquiry, and the court proceeds to assess whether the materials Ms. Peterson brought into the jury room prejudiced the Defendants.

As a threshold matter, this court rejects Defendant Ryan's repeated attempts to characterize Ms. Peterson's handwritten note as an extraneous legal "instruction." *See* Ryan Post-Trial Mot. at 8, 10, 13. This document is not a "technical exposition on a juror's good faith obligation to deliberate," nor was it somehow beyond the ability of a "substitute kindergarten teacher" (Ms. Peterson works as a substitute teacher) to produce without the aid of outside research. Ryan Reply at 7. Even before Ms. Peterson did her "homework," Tr. at 80 (05/05/06), the jurors were clearly under the defensible impression that deliberation entailed discussion of the evidence. See Final Jury Instr. at 148 ("You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors."). Indeed, according to Ms. Peterson, that was what precipitated her Internet research. Tr. at 80 (05/05/06). The court believes that what Ms. Peterson gleaned from the AJS article was not that jurors were always required to support their views with the evidence—the article takes no such position—but that a juror could be removed for failing to "deliberate," as these jurors, Ms. Peterson in particular, understood that term. *See id.* at 83. The fact that Ms. Peterson committed her "thoughts" to paper, *id.* at 62, 66, is of no moment.[27]

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[27] This is not a case where the juror's "personal experiences" constitute extrinsic evidence. Ryan Reply at 8. Ms. Peterson's

Accordingly, the court concludes that neither Ryan's right to have counsel present at every "critical stage" of the proceedings, nor his right to an impartial jury, were violated or even implicated by Ms. Peterson's note. Ryan Post-Trial Mot. at 3.

The AJS article, by contrast, was improperly consulted during deliberations. But whether viewed in its entirety, or specifically with reference to the portion that Ms. Peterson read aloud, it did not pertain to any substantive issue in the Defendants' trial. It concerned only the process of deliberation, and the substance of the article did not contradict any instruction that this court gave the jurors. *Cf. Genova*, 187 F. Supp. at 1024 (jurors looked up the definition of bribery in a dictionary after being explicitly instructed to consult the jury instructions, only). Moreover, the article correctly points out that the decision whether to remove a juror who is refusing to "meaningfully deliberate" is vested with the court, not the jurors. *See* AJS Excerpt ("Only if the judge concludes that the challenged juror is truly unfit to serve, will the judge be authorized to dismiss that juror and substitute an alternate juror."). The most troublesome interpretation of Ms. Peterson's comments would suggest that she believed this document was some sort of trump card in an ongoing dispute with Ms. Ezell. Tr. at 79 (05/05/06). Objectively, of course, it was no such thing, and as far as the record discloses, it did not sway the course of deliberations in the short period of time after it was brought into the jury room and Ms. Ezell was

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thoughts about proper deliberation are not "personal knowledge regarding the parties or the issues involved in the litigation that might affect the verdict." *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991).

removed for failing to disclose her criminal history. *Id.* ("[A]fter I read that pinking shear one about having to deliberate, she still refused to cooperate or do anything or even look at the evidence, wouldn't even look at the screen when we were showing things."). More importantly, it did not play any role in the reconstituted jury's deliberations. Ms. Peterson testified, credibly in this court's estimation, that she did not discuss this document with the substituted jurors or otherwise refer to it during deliberations after Ms. Ezell and Mr. Pavlick were removed. *Id.* at 89–90. Even if she had, the court does not believe that, objectively, there is a "reasonable possibility" that this document affected the verdict in this case.

Both Defendants cite persuasive authority from the Ninth Circuit for the proposition that "[j]urors cannot fairly determine the outcome of a case if they believe they will face 'trouble' for a conclusion they reach as jurors." *See* Ryan Post-Trial Mot. at 9; Warner Post-Trial Mot. at 19–20 (citing *United States v. Rosenthal*, 445 F.3d 1239, 1245 (9th Cir. 2006)(superseded by *United States v. Rosenthal*, 454 F.3d 943 (9th Cir. 2006)).[28] Even if this court were bound by the decision in *Rosenthal*, it is distinguishable from the facts of this case. The defendant in *Rosenthal* was convicted of, among other offenses, manufacturing marijuana in violation of 21 U.S.C. § 841(a)(1), despite the fact that the defendant operated as an agent of a cooperative that the City of Oakland had designated "an official medical-cannabis-provider association." *Rosenthal*, 454 F.3d

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[28] After the parties filed their post-trial briefs, the Ninth Circuit amended its earlier decision. Although this court will cite the superseding opinion, it is, in all respects pertinent to this decision, identical to the earlier decision.

at 945–46. The trial court became aware that one of the jurors, on the eve of rendering a verdict, asked an attorney-friend whether she "had to follow the Judge's instructions, or if [she] had any leeway at all for independent thought." *Id.* at 948, 950. The attorney told the juror that she was required to follow the court's instructions, and that the juror "could get into trouble if [she] tried to do something outside those instructions." *Id.* at 950. The clear import of the juror's question was whether the juror was free to conclude, contrary to the federal statutes at issue, that the defendant was acting within the law.

The focus of the Ninth Circuit's prejudice analysis was the potentially coercive effect of the attorney's warning on the juror's decision to "acquit or convict." *Id.* By contrast, this court does not believe that the AJS article, even though it raised the specter of juror dismissal, would lead a reasonable juror to "change his or her *determination*" for fear of punishment. *Id.* (emphasis added). The jurors in this case were instructed to "deliberate," and to "consult with one another, express [their] own views, and listen to the opinions of [their] fellow jurors." Final Jury Instr. at 148. The jurors may have reasonably believed, even without consulting extraneous material, that they could be removed if they refused to "deliberate." Tr. at 79 ("[Ms. Ezell] refused to deliberate, and she'd state over and over, 'I don't need to deliberate.'"). Accordingly, this court does not believe that the AJS article would coerce a reasonable juror into changing his or her ultimate determination, or abandoning his or her "honest beliefs." Final Jury Instr. at 148. This factor also distinguishes this case from those cases, cited by Defendant Ryan, in which a jury is admonished by someone other than the judge

(typically a bailiff) that they must reach a decision. *See, e.g., United States ex rel. Tobe v. Bensinger*, 492 F.2d 232, 238 (7th Cir. 1974) (coercive statement by bailiff, "You must reach a decision," prejudicial). The AJS article does not state or imply that jurors must reach any decision, unanimous or otherwise, at the expense of their honestly held beliefs. Indeed, it suggests just the opposite. See AJS Excerpt (stating that juror cannot be removed if he or she "is merely expressing an alternative viewpoint that will likely result in a hung jury").

The court's conclusion is bolstered by its continued confidence that Ms. Peterson's decision to bring extraneous materials into the jury room was an honest mistake of judgment. Tr. at 94 (05/05/06). According to Ms. Peterson and other jurors, Ms. Ezell's behavior during deliberations caused significant discord in the jury room. Indeed, in addition to the AJS article, Ms. Peterson also obtained from the Internet an article entitled "Dealing with Difficult People". *Id.* at 61. Ms. Peterson believed, incorrectly though in good faith, that these materials did not violate the court's order about consulting extraneous materials because they were unrelated to the trial itself. *Id.* at 81.[29] The court is not persuaded by the notion, advanced on numerous occasions by Ryan's counsel, that a cadre of jurors sought to silence dissenting views of the evidence, and that Ms. Peterson's research is another

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[29] Although instructed not to consult the Internet, this court's admonitions were, as the government points out, couched in terms of avoiding trial publicity. See Tr. at 2426–28 (09/28/05); Tr. at 7695 (11/09/06). This does not excuse Ms. Peterson's conduct, but does give the court further comfort that its assessment of Ms. Peterson's credibility was sound.

facet of their scheme. On the contrary, the court believes that the jurors who deliberated to verdict in this case were diligent and impartial. *See Bruscino*, 687 F.2d at 941 (trial judge's experience with jury during trial is relevant to court's analysis of possible prejudice). They sat attentively through nearly six months of evidence and deliberated 10 days before reaching their verdict. The court believes that these jurors made every effort to be fair, even amid extraordinary public scrutiny. With respect to the AJS article in particular, the court concludes that there is no reasonable possibility that any juror was persuaded to vote contrary to what his/her conscience and understanding of the evidence would otherwise dictate.

2. *Impact of dismissing jurors in the midst of contentious deliberations*

As previously discussed, *see supra* Part IX.A, this court removed Ms. Ezell from the jury, without objection by defense counsel, because she failed to disclose her criminal history on her juror questionnaire. Tr. at 24483, 24485 (03/27/06). Coincidentally, she was removed on the heels of the contentious deliberations just discussed. After she was dismissed, Ms. Ezell made a number of statements to the media in which she claimed that she was the only member of the jury who believed Ryan was innocent of some of the charges. Ryan contends that the other jurors may have believed that Ms. Ezell's removal "bore some relationship to her support for Ryan," and that her dismissal chilled the free expression of pro-defense opinions in the jury room. Ryan Post-Trial Mot. at 24.

Although this court had no knowledge of Ms. Ezell's views of the evidence, the court was nevertheless sensitive to defense counsel's concern that the remaining jurors might believe her dismissal was related to their difficulties during the first week of deliberations. Accordingly, after Ms. Ezell and Mr. Pavlick were dismissed, the court instructed the reconstituted jury as follows:

> A word to my jurors. You have heard by now that two of the original jurors in this case were excused from further jury service. I want you to know, as I've told some of you already, that the circumstances that brought about the fact that these two jurors were excused, those circumstances were not prompted by any of the lawyers or by the parties in this case, nor by your previous deliberations, those of you who were here. Rather, the inquiry was generated by members of the media. It is not related to the lawyers in this case. I want you to know that in attempting to reach verdicts in this case you are answerable only to your own conscious [sic]. It is your job, and your job alone, to find the facts in this case and to apply the law that I have given you.

Tr. at 24804–05 (03/28/06). The court then reread the jury instructions to the reconstituted jury. *Id.* at 24806–90. After it was alleged that Juror Chambers had discussed the case with a third party (see infra), and that this individual had mentioned Ms. Ezell's dismissal, this court again admonished the jury by letter:

> As you know, two jurors were excused from further service on this case. The reasons they

> were excused have nothing to do with the views they expressed in early deliberations nor with any communications with me concerning those earlier deliberations.

Letter from Court to Jurors of 04/03/06; Tr. at 24972 (04/03/06).

Defendant Ryan contends that the court's instructions were insufficient because they did not disclose precisely why Ms. Ezell and Mr. Pavlick were removed. Ryan Post-Trial Mot. at 25. Ryan also points out that even if the jury knew why these two jurors were removed, other jurors with undisclosed arrests (Jurors Rein, Casino and Svymbersky) remained on the jury. *Id.* This, according to Defendant Ryan, created a "significant risk" that the reconstituted jury may have believed that the court sanctioned the removal of a pro-defendant juror, and/or that a "faction" of jurors had succeeded in ousting another juror *Id.* The court believes that Mr. Ryan's concerns are unfounded. This court rejected the prior request to remove Ms. Ezell in no uncertain terms. Letter from Court to Jurors of 3/23/06. If the jurors had any lingering doubts about the court's position, its March 28 and April 3 instructions dispelled those doubts. Accordingly, the court believes that it effectively refuted any suggestion that some jurors had successfully ousted one of their own.

Mr. Ryan's second concern, that jurors may have believed that Ms. Ezell was removed for her views of the evidence, is likewise unfounded. First, it necessarily implicates the court. After all, the court removed the Ms. Ezell and Mr. Pavlick and communicated that decision to the jurors. Besides explicit instructions, *see* Final Jury Instr. at 2, 148,

the court communicates its impartiality to jurors in numerous ways over the course of a trial (e.g., ruling on objections). Accordingly, there is no reasonable basis to suppose that these jurors inferred that the court removed a juror because of his or her view of the evidence. Even assuming that the court's March 28, 2006 instruction left the door open for such an inference, it was closed by this court's April 3, 2006 instruction, which disavowed any connection between Ms. Ezell's and Mr. Pavlick's views of the evidence and their dismissal. The court rejects Defendant Ryan's contention that Ms. Ezell's removal chilled free expression of pro-defense opinions.

3. Impact of juror investigations during deliberations

Both Defendants contend that their right to an impartial jury was impaired by investigations into the jurors' backgrounds during deliberations. Ryan Post-Trial Mot. at 26; Warner Post-Trial Mot. at 19. As a threshold matter, there would not have been, contrary to Ryan's contention, any confusion about who prompted the investigations. Ryan Post-Trial Mot. at 26. This court explicitly told the jurors that neither defense nor prosecution counsel initiated the investigation. Tr. at 24804–05 (03/28/06) ("[T]he inquiry was generated by members of the media. It is not related to the lawyers in this case."); *see also* Tr. at 24516–17, 24542 (03/27/06); Tr. at 24643–44 (03/28/06). Nor is the court persuaded by Ryan's more general argument that the jurors might want to curry favor with the prosecution if they believed they were being investigated. Ryan quotes several news reports published during deliberations that state that a juror could be subject to prosecution for lying on his or her juror questionnaire. *See* Exs. 7–9 to Ryan Post-Trial

Mot. Ryan speculates that it is possible the jurors saw these statements, based on statements by two of the alternate jurors (one of whom, Mr. Masri, did not deliberate) that they were aware, based on headlines they had seen, that the media was reporting "juror problems." Ryan Post-Trial Mot. at 27.

Several jurors were questioned about omissions from their juror questionnaires, and yet were retained to deliberate with the reconstituted jury. Although, as Ryan points out, only Ms. Gomilla was explicitly told that she was not in any trouble, Tr. at 24502 (03/27/06), it is implausible that the retained jurors would harbor any fear of prosecution. As for the remaining jurors, who were not specifically questioned about their questionnaires, they would have no reason to conclude that they were the targets of any investigation. With respect to the news reports, there is no indication in the record that any jurors saw more than headlines in connection with this matter. Nor is the court prepared to assume that the jurors ignored this court's many explicit instructions to avoid such media coverage.[30] Finally, the court instructed the reconstituted jury that the *voir dire* process initiated in the wake of the allegations concerning Ms. Ezell and Mr. Pavlick, was "complete, and I do not anticipate any further questioning of jurors. In any event, none of my questions should be considered in any way as you deliberate in this case." Tr. at 24789 (03/28/06). Accordingly, the court believes that it dispelled any

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[30] Defendant Warner's argument that even seeing these headlines violated this court's order is incorrect. Warner Post-Trial Mot. at 5–6.

speculative fear the jurors may have had about being investigated.

Remmer, which Ryan cites in his reply brief, is inapposite. *Remmer*, 347 U.S. at 229; Ryan Reply at 14. In that case, a juror reported to the court an incident of apparent jury tampering, and the court—without consulting or informing defense counsel—enlisted the prosecution and the F.B.I. to investigate. *Remmer*, 347 U.S. at 228. Indeed, the defense did not learn about the episode until reading about it in a newspaper after the verdict. *Id.* So, not only was the alleged act of jury tampering potentially prejudicial, but so too was the government's "unauthorized invasion." *Id.* at 229. In this case, the investigation took place with the parties' consent and, as previously discussed, the proper precautions. In sum, the court is not persuaded that there is any reasonable possibility that jurors failed to vote their conscience for fear of prosecution.

4. Alleged ex parte communications

This court instructed the jury on numerous occasions not to discuss the case with third parties. Defendant Ryan maintains that Juror Chambers violated those instructions, and that her improper *ex parte* communications are presumptively prejudicial. Ryan Post-Trial Mot. at 39–40 (citing *Remmer v. United States*, 347 U.S. 227, 229 (1954). On March 28, 2006, an individual (Dennis McLaughlin) phoned a local radio show to describe a conversation he claimed to have had with a juror in this case. See Transcript of 3/28/06 WLS-AM (ABC) Radio Broadcast, Ex. 14 to Ryan Post-Trial Mot. Mr. McLaughlin, who owns a small coffee stand in a commuter rail station where he says the conversation

with Ms. Chambers took place, was subsequently subpoenaed and questioned by this court concerning the substance of the conversation. Tr. at 25112 at (04/10/06). Mr. McLaughlin identified Juror Chambers as the person he had spoken with, and recounted that she had told him, in response to his question about whether they were going restart deliberations after Jurors Ezell and Pavlick were excused, that the jurors had not started deliberations proper, as they were "still dealing 148 pages of rules." Tr. at 25129 (04/11/06); *cf. id.* at 25137 (suggesting that he (Mr. McLaughlin) may have made the reference to "148 pages," as it had appeared "in the paper."). Mr. McLaughlin stated that he also told Ms. Chambers about a statement Ms. Ezell's son had made in an television interview to the effect that none of the remaining jurors, after Ms. Ezell's departure, were on Ryan's side. *Id.* Ms. Chambers' response, according to Mr. McLaughlin, was that "maybe that was why she was off the case." *Id.* For her part, Ms. Chambers stated that the conversation never took place. *Id.* at 25206–07.

There are, the parties agree, two issues: (1) whether the *ex parte* communication occurred in the manner described by Mr. McLaughlin; and (2) whether the Defendants were prejudiced by the communication. This court has expressed misgivings about Mr. McLaughlin's account, *see id.* at 25236–37, and its experience with Ms. Chambers over the course of *voir dire* and an long trial has left the court with a positive impression of her candor. Defendant Ryan argues that post-verdict statements by jurors in this case corroborate Mr. McLaughlin's story, Ryan Post-Trial Mot. at 38–39, but those statements do not foreclose the possibility that Mr. McLaughlin gleaned

information about the progress of deliberations from one or more of the many media reports that were circulating at that time.

Even if Ms. Chambers did have a conversation with Mr. McLaughlin, the court does not believe that there is a reasonable possibility that that conversation prejudiced the Defendants. Ryan contends that prejudice must be presumed, citing *United States v. Remmer*, 347 U.S. 227, 229 (1954). As previously discussed, *Remmer* dealt with suspected jury tampering—an unknown third party contacted a juror and "remarked to him that he could profit by bringing in a verdict favorable to the petitioner." *Id.* at 450–51. The Seventh Circuit has noted that it is unclear whether *Remmer's* presumption of prejudice applies to *ex parte* communications not involving jury tampering. *Whitehead v. Cowan*, 263 F.3d 708, 724 (7th Cir. 2001). Irrespective of whether the presumption ever applies to such communications, the court noted that the nature of some *ex parte* communications do not warrant the presumption. *Id.* The defendant in *Whitehead* was accused of aggravated kidnaping and murder. *Id.* at 714. After the victim's mother took the stand to testify, the judge inexplicably retired to chambers with counsel and the court reporter, leaving the witness, the defendant and the jury in court. *Id.* at 723. While the judge was absent, the witness began shouting at the defendant, asking at one point why the defendant killed her daughter. *Id.* When the judge returned and discovered that the communication had taken place, he admonished the jury to disregard her comments. *Id.* The Seventh Circuit held that the *Remmer* presumption did not apply, noting that the mother's comments were

directed to the accused, not the jury, and that the "mother did not attempt to persuade the jury, nor did she provide them with any extraneous information about the facts of the case." *Id.*

If the court were to adopt Mr. McLaughlin's version of events, there would have been, unlike *Whitehead*, a communication between a third party and a juror. But like the comment in *Whitehead*, the communication in this case was "innocuous," *id.* at 724–25; much more so in fact: In the communication at issue in this case, it was the juror who allegedly provided information to a third party, not an effort by a third party to influence the juror. Mr. McLaughlin explicitly stated that he did not attempt to persuade Ms. Chambers or do anything that might affect the trial. Tr. at 25131 (04/11/06). The only piece of information Mr. McLaughlin is alleged to have communicated to Ms. Chambers was the fact that Ms. Ezell's son had made comments to the media concerning the attitude of the deliberating jurors towards Defendant Ryan. *Id.* at 25129. Ms. Chambers' alleged response, to the effect that "maybe" that was why Ms. Ezell was removed from the jury, is at best ambiguous and may, as this court has previously suggested, been an attempt to extricate herself from an uncomfortable situation. *Id.* at 25148–50. Even if the court accepted the Defendants' highly speculative suggestion that this was a window into the jurors' understanding of Ms. Ezell's removal, this court instructed the reconstituted jury that the Jurors Ezell and Pavlick were not removed because of what had occurred during their prior deliberations. Tr. at 24804–05 (03/28/06); Tr. at 24972 (04/03/06). The court concludes that the alleged conversation between Ms.

Chambers and Mr. McLaughlin "would not affect a reasonable juror's deliberation as to whether or not" the Defendants committed the crimes they were charged with. *Whitehead*, 263 F.3d at 725.

5. Juror exposure to trial publicity

Defendants Warner and Ryan contend that Jurors Svymbersky and Rein violated the court's repeated instructions to avoid media coverage of the trial. The Defendants' trial was well-publicized, and the court was sensitive to the fact that undue media exposure could prejudice the Defendants. Accordingly, this court instructed the jurors to avoid newspaper accounts by removing articles about the case before they read the paper, and to walk out of the room if the television news featured a story about the trial. Tr. at 2427 (09/28/05). At the same time, this court also acknowledged that short of sequestering the jury—a step that would have entailed an even greater intrusion into the lives of these jurors than they were already subjected to—the jurors' most diligent attempts to avoid media coverage would not be completely successful. *See, e.g.*, Tr. at 2427 (09/28/05); Tr. at 25044 (04/06/06). So, the fact that Jurors Rein and Svymbersky were exposed to headlines and pictures related to the case is not surprising, nor was it prejudicial in this case. Although both jurors stated that they read newspapers, which was not contrary to the court's instructions, see Tr. at 17646 (12/05/05), they further stated that they attempted to avoid stories regarding the trial. Tr. at 24547 (03/27/06) (Svymbersky: "If I saw a headline, I would just pass it. I wouldn't read anything about it."); Tr. at 24639–40 (Rein threw away the "Metro" section of the paper). Svymbersky stated that he read a front-page headline that quoted

rhetoric from the government's closing argument ("12 Years of Christmas"), but Svymbersky was, of course, present for the closing argument and heard the original statement in person. While the court would have preferred that jurors not be exposed to such rhetoric outside the courtroom, the court does not believe that it affected the course of deliberations or otherwise prejudiced the Defendants. Nor is the court troubled that these jurors did not bring these matters to the court's attention on their own, rather than in response to specific questioning. *See* Warner Post-Trial Mot. at 5. Although the court did ask the jurors to tell the court if they had been exposed to trial publicity, the jurors could have reasonably inferred that court did not require them to report *de minimis* or fleeting exposure. *See, e.g.*, Tr. at 2427 (09/28/05) ("I know that you are going to see some things that pass through your consciousness."). In any event, the court is confident that the jurors who deliberated to verdict in this case were not prejudiced by any inadvertent exposure to media coverage.

D. Juror Substitution Pursuant to Rule 24(c)

When the case initially was submitted to the jury, the court excused the remaining alternates, but directed them to continue to abide by instructions that they not discuss the case with anyone or consider any media attention, pending a verdict. On March 28, 2006, eight days after deliberations began, this court seated two alternate jurors pursuant to FED. R. CRIM. P. 24(c). Rule 24(c)(3) provides as follows:

> The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that the retained alternate does not discuss the

> case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

FED. R. CRIM. P. 24(c). Before Rule 24 was amended in 1999, a district court that replaced a deliberating juror with an alternate, instead of proceeding with 11 jurors or declaring a mistrial, committed reversible error. *See, e.g., United States v. Beard*, 161 F.3d 1190, 1194 (9th Cir. 1998) (finding decision to replace two deliberating jurors with alternates an abuse of discretion under the pre-1999 version of Rule 24). The concern, in such cases, was that the substituted juror was at a disadvantage during deliberations, "and as a result the defendant may not really be getting the jury of 12 to which he is entitled." *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir. 1985). Nevertheless, trial courts were loathe to toss out lengthy trials based upon last-minute juror misconduct, especially when alternates were available, and those appellate courts that did not reverse the trial court for violating the letter of Rule 24, created elaborate justifications for their failure to do so. *See, e.g., United States v. Virgen-Moreno*, 265 F.3d 276, 289 (5th Cir. 2001) (setting out a four-factor test to determine whether the defendant was actually prejudiced by substituting jurors post-submission). After the 1999 amendments, such machinations are no longer necessary.

Although the Seventh Circuit has yet to directly address this issue, it has given every indication that the amended rule reverses the prior presumption that a late-arriving juror is incapable of deliberating fairly with jurors who have already begun

deliberations. In *United States v. Johnson*, a juror who had served during the guilt phase of a capital-punishment trial failed to appear for the penalty phase and was replaced with an alternate. 223 F.3d 665, 669 (7th Cir. 2000). When the defendant argued that this late-substitution violated 18 U.S.C. § 3593(b)(1), (requiring that a death penalty sentencing hearing be conducted "before the jury that determined the defendant's guilt"), the Seventh Circuit turned to the amended Rule 24(c) for guidance. *Id.* at 670. Citing the portion of *Josefik* that Ryan relies on, see Ryan Post-Trial Mot. at 32, the court observed: "[T]he fact that the alternate missed some of the deliberations is no longer regarded as a fatal objection, or indeed as any objection, to his participating in the jury's decision." *Johnson*, 223 F.3d at 670. Significantly, the Defendants rely exclusively on case law interpreting pre-amendment Rule 24.[31] The plain language of Rule 24(c) and the Seventh Circuit's discussion in *Johnson* refute the notion, advanced in the pre-amendment cases Ryan cites,[32] that substituted jurors are at an insurmountable disadvantage in deliberations.

Nevertheless, Defendant Ryan contends that seating two alternates in this case prevented

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[31] *Cf. United States v. Bradley*, 79 Fed. Appx. 335 (9th Cir. 2003) (Caselaw interpreting pre-amendment Rule 24 is superseded "by the plain language of the new rule.").

[32] *See People v. Burnette*, 775 P.2d 583, 588 (Colo. 1989); *State v. Lehman*, 321 N.W.2d 212, 220 (Wis. 1982); *cf. United States v. Register*, 182 F.3d 820, 843 n.36 (11th Cir. 1999) (finding no prejudice to defendant in violation of pre-amendment Rule 24 before quoting the then-proposed amendment and observing: "This rule, announced by the Supreme Court, intimates that such a procedure does not deprive defendants of any rights.").

meaningful deliberations. Ryan Post-Trial Mot. at 29. Ryan contends that the jurors did not, indeed could not, heed this court's admonition to begin deliberations anew. *Id.* at 29–30. The original jury deliberated for eight days, although, as this court observed at the time, they were not "full" or "long days." Tr. at 24603–04 (03/28/06). In any event, according to Ryan, the jurors who participated in both the original and the reconstituted juries' deliberations could not have put their prior deliberations out of their minds. Ryan further argues that the substituted jurors were exposed to improper outside influences. *Id.* at 28–29. While the court does not believe that Rule 24(c) permits the court to substitute jurors during deliberations in all circumstances, the court is convinced that substitution in this case preserved the "essential feature" of the jury. *Henderson v. Lane*, 613 F.2d 175, 177 (7th Cir. 1980).

Consistent with Rule 24(c), this court took a number of precautions to ensure that the reconstituted jury began deliberations anew. FED. R. CRIM. P. 24(c)(3) ("If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew."). As noted, when the alternates were initially excused, the court directed that they not consider media attention until they learned that a verdict was returned. When the alternates were called back, the court confirmed on the record that Jurors Svymbersky and DiMartino had not in fact been unduly exposed to trial publicity or to the comments of other third parties. Tr. at 24539–43 (03/27/06). Both jurors explained that they had adhered to that direction, cutting off any person who attempted to speak with them about the case. Tr.

at 24539–40, 24547 (03/27/06). Of course, these jurors were not completely shielded from information concerning the trial, but the court satisfied itself that both jurors' exposure was inadvertent and innocuous. Tr. at 25044–45 (04/06/06); see *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.").

With respect to the jurors who had participated in the first week of deliberations, the court interviewed each of them individually and received assurances that they were capable and willing to "start all over today and completely disregard any of the discussions that have happened before." Tr. at 24759–78 (03/28/06). Once the decision to proceed with the alternate jurors was made, the court instructed the entire jury that they must "completely put out of your prior deliberations out of your mind . . . . You also should not discuss or mention any statements or comments made during the prior deliberations when you begin these new deliberations." *Id.* at 24805. The court then reinstructed the reconstituted jury. *Id.* at 24804–91. Case law from other jurisdictions interpreting pre-1999 Rule 24 support the conclusion that, in this case, such precautions obviated any prejudice to the Defendants. *See, e.g., United States v. Hillard*, 701 F.2d 1052, 1056–57 (2d Cir. 1983); *United States v. Kopituk*, 690 F.2d 1289, 1307–08 (11th Cir. 1982). More importantly, the current version of Rule 24 presumes that post-submission substitution, when accompanied by instructions to begin deliberations anew, is not prejudicial. FED. R. CRIM. P. 24(c)(3); Johnson, 223 F.3d at 670. The court has no basis to conclude that the presumption has been rebutted in this case.

The Defendants argue that because of the "extensive juror misconduct" in this case, the court cannot assume that these jurors followed the court's instructions to begin deliberations anew. Ryan Reply at 16. As previously discussed, the court believes that the Defendants have significantly overstated the degree of juror "misconduct" in this case. *See supra* Part IX.C. The jurors who deliberated to verdict in this case were attentive and conscientious, a conclusion the court believes is further bolstered by the fact that they deliberated for ten days after they were reconstituted. *See Kopituk*, 690 F.2d at 1311 (individual assurances from jury that they would begin deliberations anew, plus the fact that they deliberated for "a full week" after being reconstituted, sufficiently indicated that they followed instructions to begin anew); *Cf. United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) (overturning guilty verdict rendered by jury that deliberated for 29 minutes after they were reconstituted). In *Lamb*, the original jury had already returned a guilty verdict that the court rejected, a circumstance lending further support for the court's conclusion that the reconstituted jury did not heed the trial court's instruction to "begin and the beginning." *Lamb*, 529 F.2d at 1155. According to Defendant Ryan, the present case is somewhat analogous insofar as "we now know that the jury deliberated to verdict on some counts." Ryan Reply at 16. Ryan asserts that the jurors had reached verdicts on two counts based on post-verdict statements that some jurors made to the media. Ryan Post-Trial Mot. at 38–39 n.16. First, the court notes that Ryan's assertions about the first jury's progress vary as it suits his purposes. *Compare* Ryan Post-Trial Mot. at 31 (stating the jurors had deliberated to verdict on two counts); *with id.* at 39 (citing newspaper articles

that purportedly corroborate Mr. McLaughlin's recollection of his conversation with Juror Chambers to the effect that the jury was still "working through the instructions"). Second, and more importantly, these statements are not competent evidence. See FED. R. EVID. 606(b).

Ryan also relies on post-verdict comments to the media for the proposition that the reconstituted jury did not, in fact, follow the court's instruction. *Id.* at 29–30. Leaving to one side the fact that these statements cannot be used to impeach the verdict, the substance of the juror's post-verdict comments actually confirms that they did endeavor to begin anew. The jury, as a whole, appears to have allowed the substituted jurors to set the agenda for the entire group "so the original jurors 'would not try to sway [them], or give [them] an opinion." 04/18/2006 Article, Ex. 12 to Ryan Post-Trial Mot. Ryan's suggestion that these and similar statements indicate that the jurors did not deliberate as a group is, at best, unconvincing. "[H]anding the reins" to the alternate jurors was a sensible procedure for following the court's instructions, not an indication that they flouted those instructions.

In sum, court concludes that substituted two jurors after deliberations began did not violate either Rule 24(c) or the Sixth Amendment.

E. Seating Additional Alternates

This court seated eight alternates, two more than is contemplated by Rule 24(c)(1). This fact was brought to the court's attention by the prosecution before opening statements were completed. Tr. at 2499 (09/28/05). Indeed, the government explicitly asked whether defense counsel objected. *Id.* ("[I]

assume there's no objection by anybody to that?"). Defense counsel for Warner stated expressly that he did not object, *id.*, a claim that Warner does not dispute in his post trial motion. The record does not reveal any response from Ryan's counsel. The government contends that Ryan waived the objection; Ryan contends that, at most, he merely forfeited the objection.

Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Williams*, 272 F.3d 845, 854–55 (7th Cir. 2002) (citations and internal quotation marks omitted). Forfeiture "is simply the failure to make a timely assertion of a right." *Id.* Waiver can be implied "where an intention to relinquish the right, although not expressed, can be inferred," although "implied waiver" is often difficult to distinguish from "forfeiture." *Johnson*, 223 F.3d at 668. Consistent with its previous ruling, (Tr. at 24367 (03/27/06)), the court concludes that Ryan implicitly waived the objection. The court's deviation from the letter of Rule 24(c) was explicitly called to defense counsel's attention by the prosecution, and yet counsel for Ryan said nothing. There were, of course, daily reminders over the course of an almost six-month trial that there were 20 jurors in the jury box. It is implausible that Ryan's counsel simply forgot to object, or was waiting for the right opportunity. Moreover, Ryan's argument that the court "represented that [the additional alternates] would not be seated" is frivolous. Ryan Post-Trial Mot. at 35 n. 14. The court stated that the "worst case scenario" was that the additional alternates would hear all of the evidence but never deliberate, not that the court would not seat these alternates. Defense counsel

cannot seriously contend that the court would require two citizens to sit through a very long trial as spectators. Moreover, as the government points out, defense counsel never articulated this rationale despite multiple opportunities to do so as the parties discussed what to do in the wake of dismissing Jurors Pavlick and Ezell. Accordingly, the court concludes that Ryan waived his objection to the Rule 24 violation.

F. The Court Properly Denied Defendants' Request to Interview Jurors

Defendant Ryan also argues that the court improperly relied on Federal Rule 606(b) and *Tanner v. United States*, 483 U.S. 107 (1987), in denying his motion to interview Jurors Ezell and McFadden. In *Tanner*, the Supreme Court held that the defendant's Sixth Amendment rights were not violated when, pursuant to Rule 606(b), the trial court declined to hold an evidentiary hearing at which jurors would testify after allegations surfaced that some jurors were impaired by alcohol and drugs during portions of the trial. *Tanner*, 483 U.S. at 127. Ryan argues that since he requested only an opportunity to interview jurors informally, *Tanner* and Rule 606(b) are not implicated. This court has discretion under Local Criminal Rule 31.1 to deny counsel's request to interview jurors. In exercising that discretion, the likelihood that juror interviews will yield admissible evidence is certainly a factor. *See, e.g., United States v. Moten*, 582 F.2d 654, 665 (2d Cir. 1978).

At the time that the Defendants sought to interview Ms. Ezell and Ms. McFadden, there were no allegations that improper external influence had been brought to bear on any juror. Only after this

court denied Defendants' motion did Ms. Ezell allege that another juror brought extraneous material into the jury room. Ryan Post-Trial Mot. at 47 n.21. The court then conducted a thorough hearing on the matter, during which defense counsel was permitted to pose questions. But at the time the court ruled on the request to interview jurors, the Defendants were relying on statements to the press made by Ezell and McFadden that amounted to little more than name-calling. There was certainly no indication that the interviews would yield information that could be used to impeach the verdict. This was especially true with respect to Ms. McFadden, who was removed from the jury for reasons that have nothing to do with the alleged misconduct of other jurors, and who played no part in either the first or the second round of deliberations in this case. Even though these jurors may have wanted to speak with defense counsel, interviews with either or both jurors about what went on in the jury room would necessarily entail further intrusion into the lives of the other jurors, who would feel compelled to respond to any actual or perceived inaccuracies in Ezell's and McFadden's statements. The fact that some of these jurors have chosen to speak with the media on their own terms does not persuade the court that they have invited or would welcome the additional attention that interviews would entail. There are also powerful institutional interests in respecting the finality of verdicts that caution against any further intrusion into the jurors' deliberations. The court reaffirms its decision to deny juror interviews.

G. Juror Problems, Viewed as a Whole, Do Not Rebut the Presumption that Jurors Followed Instructions to Assess Warner's Culpability Independently

As Warner points out, a critical issue with respect to his numerous motions for severance is whether the jury was able to sort out the evidence among the defendants. *United States v. Thompson*, 286 F.3d 950, 968 (7th Cir. 2002). To ensure that the jury would draw the necessary distinctions between the Defendants, this court gave numerous limiting instructions both during and at the end of the trial. Jurors are presumed to follow such instructions, *Thompson*, 286 F.3d at 968, but Warner contends that a host of juror-related issues already described rebut that presumption. Warner Post-Trial Mot. at 2.

As previously discussed, the court rejects Warner's contention that jurors who deliberated to verdict in this case lied on their juror questionnaires. *See supra* Part IX.A. The court has likewise rejected Warner's argument that jurors violated this court's numerous admonitions to avoid trial publicity. *See supra* Part IX.C.5. Warner adds to the list of perceived juror misconduct the decision of Jurors Svymbersky and James to remove their notebooks from the jury room after being discharged. Warner Post-Trial Mot. at 8. As to Juror Svymbersky, the court concluded that it was an innocent mistake, Tr. at 24448–50 (03/27/06).[33] In any event, the court does not agree that two jurors' removal of their notebooks

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[33] The court advised the jurors to leave their notebooks in the jury room during the course of the trial but did not repeat the admonition, nor did it explicitly prohibit them from removing their notebooks at the conclusion of the trial.

conclusively establishes the entire jury's inability to follow instructions. So, as a threshold matter, the court rejects the underlying factual premise for Warner's theory that "[i]f the jurors could not follow simple instructions on these topics, then they could not follow more-difficult instructions regarding the compartmentalization of evidence, [etc.]." Warner Post-Trial Mot. at 9.

Moreover, the two cases Warner cites in support of his argument that juror misconduct in this case rebuts the presumption that jurors follow instructions are plainly distinguishable. *See Dyer v. Calderon*, 151 F.3d 970, 983 (9th Cir. 1998) ("If a juror treats with contempt the court's admonition to answer *voir dire* questions truthfully, she can be expected to treat her responsibilities as a juror—to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions—with equal scorn."); *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989). In *Dyer*, a juror in a death penalty case failed to disclose at *voir dire* that her brother was the victim of a murder performed in a manner similar to the *Dyer* defendant's alleged crime. 151 F.3d at 976-77. Furthermore, the *Dyer* prosecutor had prosecuted the juror's brother's killer. *Id.* When given the opportunity to correct her initial omission, rather than doing so, the juror told the trial judge that she believed that her brother's death was an accident. *Id.* The facts surrounding the juror's brother's death, however, plainly bespoke foul play—facts known to the juror in her capacity as the plaintiff in her brother's wrongful death suit. *Id.* In a further bizarre twist, after the conviction of the *Dyer* defendant, the juror went on to take a job as a guard on death row in San Quentin where the *Dyer* defendant awaited

execution. *Id.* at 982 n. 18. The Ninth Circuit concluded that the juror lied and that her lies gave rise to an inference of implied bias against the defendant because the subject matter of what she concealed and the repetition of her lies indicated that she had lied to protect her position on the jury. *Id.* at 982. *Colombo* involved a juror who deliberately concealed her relationship with a government lawyer. 869 F.2d at 150. The *Colombo* court did not have to guess at this juror's intentions: the juror involved actually stated to another juror that she had lied in order to obtain a seat on the jury. *Id.* The *Colombo* court observed:

> Knowingly lying during the *voir dire* violated, *inter alia*, 18 U.S.C. § 1621 (1982), and subjected the juror to possible criminal contempt pursuant to 18 U.S.C. § 401 (1982), as well as to possible substantial restitution claims by the government. . . . It exhibited a personal interest in this particular case that was so powerful as to cause the juror to commit a serious crime. Such an interest not only suggests a view on the merits and/or knowledge of evidentiary facts but is also quite inconsistent with an expectation that a prospective juror will give truthful answers concerning her or his ability to weigh the evidence fairly and obey the instructions of the court.

869 F.2d at 151-52 (citations omitted).

The jurors' deliberate and outrageous misrepresentations in *Dyer* and *Colombo* are in no way analogous to the honest mistakes that the jurors in this case made. Nevertheless, Warner argues that the court should infer from individual juror's honest

mistakes with regards to particular instructions that the jury as a whole was unable to follow the court's limiting instructions. The court finds this inference suspect on at least two grounds. First, as *Dyer* and *Colombo* demonstrate, courts draw a distinction between honest mistakes and purposeful deceptions. Drawing this distinction is sensible. For all but the theoretically least competent juror, the possibility of misinterpreting an instruction from the court will be less than the certainty that the instruction will be disregarded by a juror who purposefully intends to do so. Second, the court does not find a compelling connection between evidence that individual jurors occasionally made individual mistakes implementing the court's instructions, and the assumption that these same jurors would make much graver mistakes when acting together. Unlike the mistakes the jurors made alone, the possibility that one juror would think some piece of evidence admitted only against Ryan was also applicable to Warner must be balanced against the likelihood that his or her eleven peers on the jury would recognize the juror's error and correct him or her.

For the same reason, the court is unwilling to assume that the jurors were incapable of following its instruction that Defendant Ryan as a public official had a duty of honest services while Warner, as a private citizen, did not. The court instructed the jurors to this effect. Final Jury Instr. at 70, 82. Warner draws sinister meaning from the fact that the jury unanimously convicted both Defendants of all counts. Warner Post-Trial Mot. at 10. While it is true that a court can bolster its presumption that a jury has followed its instruction by reference to the fact the jury did acquit some of the defendants on some

counts, *see, e.g.*, *Thompson*, 286 F.3d at 968, a split verdict is not a necessary condition for the ordinary presumption that the court's instructions were effective. Warner also contends that the juror issues in this case would have caused the court to declare a mistrial in a shorter trial, citing this court's recent decision declaring a mistrial in a wholly unrelated matter. *See* Warner Post-Trial Mot. at 20. The length of a trial, or more accurately, the amounts of judicial, prosecutorial, and private resources expended over the course of a long trial, are relevant and appropriate considerations. *See, e.g.*, *McDonough*, 464 U.S. at 555 ("To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give."); FED. R. CRIM. P. 24(c).

For all these reasons, the court finds that it did not err in denying Warner's repeated motion for severance and does not find that the interests of justice require it to grant Warner a new trial on this basis now.

CONCLUSION

Ryan's motion for judgment of acquittal is granted with respect to Counts Nine and Ten and otherwise denied. Ryan's motions to dismiss, for new trial, and for arrest of judgment (686, 721- 1,2, 778, 817-1,2,3) are denied. Warner's motion for acquittal is granted with respect to Count Nine and otherwise denied. His motions for severance (260-1,2, 584, 674, 829) are denied. Warner's motions to dismiss, for new trial, and arrest of judgment (673, 818, 830-1,2) are denied.

ENTER:

Dated:
September 7, 2006

/s/
REBECCA R. PALLMEYER
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Nos. 02 CR 506**
	)	
LAWRENCE E. WARNER and GEORGE H. RYAN, SR.,	)	**Judge Rebecca R. Pallmeyer**
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Defendants Lawrence E. Warner and George H. Ryan, Sr. have been charged in a 22-count second superseding indictment with (1) conspiring to use the resources of the State of Illinois for their personal and financial benefit and for the benefit of Ryan's family members, the Citizens For Ryan political campaign committee, and various political and business associates, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(d); and (2) devising a scheme to defraud the people of the State of Illinois and the State of Illinois of money, property, and the right to the honest services of Ryan and other State of Illinois officials, in violation of the federal mail fraud statute, 18 U.S.C. §§ 1341, 1346. Ryan is separately charged with making materially false, fictitious, and fraudulent statements during several FBI interviews in violation of 18 U.S.C. § 1001(a)(2); obstructing and

endeavoring to obstruct the Internal Revenue Service in the correct reporting of income and the collection of taxes in violation of 26 U.S.C. § 7212(a); and filing materially false tax returns in violation of 26 U.S.C. § 7206(1). Warner is separately charged with extortion under the Hobbs Act, 18 U.S.C. § 1951, money laundering, 18 U.S.C. § 1956 (a)(1)(B)(i), and structuring currency transactions in violation of 31 U.S.C. §§ 5324(a)(3) and (d)(2).

Ryan and Warner both seek to dismiss the RICO conspiracy charge; to sever certain counts from the indictment and/or to sever both co-defendants from each other; to strike certain language and allegations from the indictment; and to obtain a bill of particulars. Ryan additionally asks the court to dismiss the mail fraud charges against him and seeks immediate disclosure of favorable evidence; timely disclosure of impeachment evidence; an order requiring the government to give immediate notice of its intent to offer Rule 404(b) evidence against him at trial; pretrial production of *Jencks* material and a witness list; immediate production of statements made by him; an order requiring the government to affirm or deny the occurrence and legality of any electronic or video surveillance and to produce same; an order directing the government to preserve and produce agent notes; and an order requiring the government to make a *Santiago* proffer. Warner has separately moved for an order permitting him to adopt the pretrial motions filed by Ryan; to reassert motions filed prior to the return of the second superseding indictment; and to dismiss all charges on Speedy Trial grounds. The government, in turn, has filed a motion for reciprocal discovery. For the

reasons set forth here, the motions are granted in part and denied in part.

BACKGROUND

A. The Parties

1. Ryan

Ryan was elected by the voters of the State of Illinois to serve as Secretary of State from January 1991 through early January 1999. In November 1998, he was elected Governor of Illinois and served in that capacity from January 1999 through early January 2003. (Second Superseding Indictment ("SSI"), Count 1 ¶ 1G.) In his capacity as Secretary of State and Governor, Ryan was prohibited from receiving, retaining, or agreeing to accept "any property or personal advantage which he [wa]s not authorized by law to accept knowing that such property or personal advantage was promised or tendered with intent to cause him to influence the performance of any act related to the employment or function" of his public office. 720 ILCS 5/33-1(d). (*See also* SSI, Count 1 ¶ 2C.) He was also prohibited from committing the following acts in his official capacity: (1) performing an act "in excess of his lawful authority" with intent to "obtain a personal advantage for himself or another"; or (2) "[s]olicit[ing] or knowingly accept[ing] for the performance of any act a fee or reward which he knows is not authorized by law." 720 ILCS 5/33-3(c) and (d). (*See also* SSI, Count 1 ¶ 2D.)

Pursuant to 50 ILCS 105/3, Ryan was not permitted to be "in any manner financially interested directly in his own name or indirectly in the name of any other . . . in any contract or the performance of any work in the making or letting of which [he] may be called upon to act or vote." (*See* SSI, Count 1 ¶ 2E.)

In addition, Ryan was obligated under the Illinois Governmental Ethics Act to file annually a Statement of Economic Interests with the State of Illinois disclosing, among other things, (1) the name of any entity doing business in the State of Illinois from which he derived income during the preceding calendar year in excess of $1,200 (that is, income other than for specified professional services); (2) the identity of any compensated lobbyist with whom he maintained a close economic association; and (3) the name of any entity from which a gift or gifts valued singly or in the aggregate in excess of $500 was received during the preceding calendar year. 5 ILCS 420/4A-101; 5 ILCS 420/4A-102(a)(1), (5) and (b)(3). (*See also* SSI, Count 1 ¶ 2F.) If Ryan constructively controlled the interest of a spouse or any other party as described in (1) or (3) above, he was obligated to disclose the interest as if it were his own. *Id.*

Under the Illinois Gift Ban Act, 5 ILCS 425/10, Ryan, in his capacity as Governor, was prohibited from soliciting or accepting gifts from any "prohibited sources," including a person who was registered or required to be registered with the Secretary of State under the Illinois Lobbyist Registration Act, 25 ILCS 170/1 *et seq.*[34] (*See* SSI, Count 1 ¶ 2G.) In addition, a written Secretary of State ("SOS") Office policy memorandum effective no later than August 26, 1997 prohibited SOS Office employees, including Ryan, from accepting any gifts, meals, or entertainment valued at $50 or more in a given year from any single "prohibited source," defined as "any person or entity

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[34] The Gift Ban Act was repealed effective December 9, 2003. *See* P.A. 93-617 § 85. Legislation to enact a new version of the statute is currently pending in the Illinois legislature. *See, e.g.*, 2003 IL H.B. 638 (SN).

who sought official action, did business or sought to do business with the SOS Office, conducted activities regulated by the SOS Office or had interests that could be substantially affected by the performance or non-performance of the employee's official duties." From at least August 1997 through 2002, Ryan also had a stated personal policy of not accepting personal gifts with a value exceeding $50. (*Id.* Count 1 ¶ 2J.)

Finally, political activity by SOS Office employees was at all relevant times limited in the following respects: (1) no person was permitted to induce or persuade, or attempt to induce or persuade, particular categories of state employees to violate the restrictions against performing political activity during regular working hours, 5 ILCS 320/4[35]; (2) no public funds could be used "to urge any elector to vote for or against any candidate or proposition, or be appropriated for political or campaign purposes to any candidate or political organization," 10 ILCS 5/9-25.1; and (3) SOS Office employees were prohibited from using state working time for personal gain or for any reason other than performing their governmental duties, or from participating in any political campaigning or activity while on duty. (SSI, Count 1 ¶ 21.)

2. Warner

Warner owned and operated several businesses, including two entities named National Consulting Company and Omega Consulting Group Ltd. (*Id.* Count 1 ¶ 1 H.) In or about November 1990, then-Secretary of State Ryan appointed Warner as a

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[35] This statute was repealed effective November 19, 2003. *See* P.A. 93-615, Art. 90, § 90-6.

member of the SOS Office Transition Team, a team of individuals designated to review the practices and procedures of the SOS Office and make recommendations for changes and improvements. Warner attended internal SOS Office meetings, including policy meetings and staff retreats; occasionally performed private work inside Ryan's governmental offices; directed and advised SOS Office personnel, including one or more department directors, regarding matters related to the award of SOS Office contracts and real property leases; and assisted in determining the content of official SOS Office communications and contract specifications. (*Id.* Count 2 ¶ 2C.) Warner was never an official or employee of the State and did not draw a state salary or consulting fees.

Pursuant to the criminal laws of the State of Illinois, Warner was prohibited from promising or tendering to a public official, with intent to influence the performance of any official act, any property or personal advantage which the public officer would not be authorized by law to accept. 720 ILCS 5/33-1(c). (*See also* SSI, Count 1 ¶ 3A.) In addition, the Illinois Lobbyist Registration Act, effective in January 1994, required that Warner register with the SOS Office as a lobbyist if he qualified under either of the following definitions: "(1) Any person who, for compensation or otherwise, either individually or as an employee or contractual employee of another person, undertakes to influence executive, legislative or administrative action"; or "(2) Any person who employs another person for the purposes of influencing executive, legislative or administrative action." 25 ILCS 170/3. (*See also* SSI, Count 1 ¶ 3B.) The same Act required Warner to disclose in annual statements filed with

the SOS Office all expenditures related to lobbying, and to itemize any expenditures over $100 made on behalf of, or benefits given to, any legislative or executive branch official, including gifts and travel and entertainment expenses. 25 ILCS 170/6. (*See also* SSI, Count 1 ¶ 3C.)

3. Others

Donald Udstuen conducted lobbying activities for medical professionals in Illinois and served as the Chief Operating Officer for the Illinois State Medical Insurance Exchange, a company that provides malpractice insurance to Illinois physicians. *See* http://www.ismie.com. Ryan appointed him co-chairman of the SOS Office Transition Team, and at times during Ryan's political career, Udstuen served as an advisor and fundraiser for Ryan's political campaigns. (SSI, Count 1 ¶ I, Count 2 ¶ 2B.) "Associate 1" was a lobbyist and consultant representing individuals and entities before the Illinois legislature and executive offices, including the SOS Office and the Governor's Office, from approximately 1973 through December 2002. In that capacity, Associate 1 met with Ryan and other Illinois government officials to promote and advance the positions of his clients. (*Id.* Count 1 ¶ 1J.) Scott Fawell served as Ryan's Chief of Staff from February 1992 to January 1999, making personnel, policy, strategic, and business decisions binding the SOS Office. He was also a principal operating officer, advisor, and decisionmaker for Citizens For Ryan, a private, state-wide political campaign committee established to support Ryan's campaign efforts. (*Id.* Count 1 ¶¶ 1K, L.) Associate 2 owned a commercial building in South Holland, Illinois which was leased to the SOS Office in May 1997. Through an entity

called Seven Seas Villa, Associate 2 also co-owned a vacation home in Jamaica and personally owned a home in Palm Springs, California. (*Id.* Count 1 ¶ 1 N.)

The second superseding indictment alleges that Ryan performed and authorized official actions to benefit his own financial interests and those of Warner, Associate 1, Associate 2, and "certain Associates and designated third parties, including Ryan family members and Citizens For Ryan." (*Id.* Count 2 ¶ 4.) Ryan and certain third parties affiliated with him allegedly received personal benefits from Warner, Associate 1, and certain other Associates, which Ryan understood were provided to influence and reward him in the performance of official acts. In addition, from the early 1990s to at least 2002, Ryan, Warner, and certain Associates concealed their financial relationships with each other. (*Id.* Count 2 ¶¶ 5, 6.) The specific allegations are detailed below.

B. Official Actions Related to Warner and Udstuen

According to the second superseding indictment, Ryan gave Warner and Udstuen access to material non-public information relating to government decisions, which enabled them to engage in transactions for their personal benefit. In early 1991, Warner told Udstuen that, as a reward for Udstuen's past service to Ryan, Ryan had approved of a plan to provide Udstuen with one-third of the proceeds that Warner obtained from certain vendors doing business with the SOS Office (American Decal Manufacturing ("ADM") and International Business Machines ("IBM")). To conceal the flow of proceeds from Warner to Udstuen, the two agreed that Warner would use

American Management Resources ("AMR"), a company owned by Udstuen's personal associate Alan Drazek, as "a conduit for the purpose of passing payments from Warner to Udstuen relating to ADM and IBM." Warner issued checks to Drazek who, in turn, gave a substantial portion of the proceeds back to Udstuen in the form of cash. (*Id.* Count 2 ¶¶ 7-10.)

1. Validation Stickers Contract

Up to and including 1991, ADM held the contract to manufacture and print vehicle registration validation stickers for the State of Illinois. As of 1991, the contract required that validation stickers bear a "metallic security mark," a product created and manufactured by ADM. (*Id.* Count 2 ¶¶ 14.) In July 1991 and continuing thereafter, Warner made unsolicited contacts with officials of ADM and pressured them to make monthly payments to him in exchange for his assurance that the metallic security mark would remain a requirement for the validation stickers contract. (*Id.* Count 2 ¶¶ 15, 16.) In 1993, a committee of the SOS Office Vehicle Services Department unanimously recommended to a high-ranking official of the Department ("SOS Official A") that the metallic security mark requirement be removed from the specifications for the validation stickers contract. SOS Official A did in fact remove that requirement but at some point Warner directed that it be reinstated. In an effort to assist Warner in his efforts on behalf of ADM, Ryan also instructed SOS Official A in April 1993 to put the metallic security mark requirement back in the contract specifications. (*Id.* Count 2 ¶¶ 17, 20-22.) Between 1991 and 2000, Warner received approximately $332,000 in payments from ADM and, with Ryan's approval, gave one-third of the proceeds to Udstuen

through payments made to American Management Resources. (*Id.* Count 2 ¶ 23.)

2. Title Laminates Contract

In August 1991, Warner told an official of ADM that in exchange for $67,000, he would cause the SOS Office title laminates contract, then held by 3M, to be awarded to ADM. At Warner's direction, and with the understanding that Warner was acting with Ryan's authority, SOS Official A "took official actions to materially benefit ADM and to the competitive disadvantage of 3M." As a result, ADM was awarded the title laminates contract between 1991 and September 1998. (*Id.* Count 2 ¶¶ 25-27.)

3. Computer Contracts

Also in 1991, Warner and Udstuen learned information pertaining to the SOS Office's mainframe computer upgrade contract. That summer, they and Associate 1 met with representatives of Honeywell/Bull ("Honeywell"), which held the existing computer contract, and conveyed to them that in exchange for total payments of up to $1,000,000, Honeywell "would be awarded one or more computer-related contracts with the SOS Office, including the prospective mainframe computer upgrade contract." (*Id.* Count 2 ¶¶ 28-30.) Honeywell managers declined to make the payments and on September 24, 1991, reported the solicitation activities to Ryan, who said that he would "get to the bottom of it." Instead, Ryan authorized Warner and Udstuen to assist in hiring a Director of the SOS Office Information Systems Services Department who would be responsible, in part, for helping in the selection and implementation of the computer upgrade contract. (*Id.* Count 2 ¶¶ 2A, 31-33.)

In or about February 1992, Warner and Udstuen learned that SOS Official B would support selecting IBM for the mainframe computer upgrade contract and recommended that Ryan hire Official B for the Director position. Ryan did so and in March 1993, Warner entered into a written contract with IBM, retroactive to July 1, 1992, in which IBM agreed to pay Warner a percentage of all revenues, up to $1,000,000, received in connection with SOS Office contracts. Based in part on the actions taken by Warner, Ryan awarded the mainframe computer upgrade contract to IBM. (*Id.* Count 2 ¶¶ 34-38.)

In 1995, the SOS Office considered a pilot project that would use computerized kiosks within certain SOS license facilities to allow citizens to renew vehicle registration, obtain validation stickers, and perform other vehicle titling and registration operations. On April 24, 1995, a high-ranking SOS Office official who supported the use of kiosks ("SOS Official C") notified Ryan and Fawell in writing that the SOS Office could view kiosk demonstrations by several vendors at an upcoming event in Columbus, Ohio. (*Id.* Count 2 ¶ 39.) The next day, Ryan, Warner, Fawell, SOS Official B, and SOS Official C traveled to Columbus to view the demonstrations, including ones by IBM and a competing vendor. Upon their return to Illinois, SOS Official C recommended to other SOS Office officials that the kiosk project be awarded to IBM's competitor. In response, Warner instructed Udstuen to direct SOS Official C to drop his opposition to IBM's selection. "Understanding that Warner and Udstuen acted with the authority of defendant Ryan, SOS Official C did as Udstuen advised." (*Id.* Count 2 ¶¶ 40-42.) In January 1996,

Ryan selected IBM for the kiosk project contract. (*Id.* Count 2 ¶ 43.)

Between 1993 and early 1999, Warner received approximately $1,000,000 in payments under his contract with IBM, principally related to the mainframe computer upgrade contract. Per their agreement, Warner directed one-third of the proceeds to Udstuen, routing the funds through American Management Resources. Warner "filed false and misleading lobbyist registration statements relating to IBM and failed to disclose all of his Ryan-related expenditures." (*Id.* Count 2 ¶¶ 44, 46.)

4. Digital Licensing Contract

In 1996, the SOS Office began an initiative to switch to a "digital licensing" system such that all State of Illinois automobile and truck drivers' licenses would be created and maintained through digital technology. Warner learned about the digital licensing system initiative in August 1996. Around the same time, Warner learned that a high-ranking SOS Office official who would have a role in implementing the system ("SOS Official D") preferred Viisage Technologies, a Massachusetts-based company that provides "advanced technology identity solutions," as a vendor for the system. (*Id.* Count 2 ¶¶ 47, 48.) (*See also* http://www.viisage.com.) In October 1996, Warner and Viisage entered into a lobbying contract. Pursuant to that contract, Warner agreed to assist Viisage in its efforts to obtain the digital licensing contract; in exchange, Viisage agreed to pay Warner a percentage of all gross revenues received by Viisage if it won the digital licensing contract. To conceal his involvement with Viisage, Warner kept his own name off the lobbying contract, presumably

to avoid the reporting and registration requirements of the Illinois Lobbyist Registration Act, 25 ILCS 170/3, 170/6. (*Id.* Count 1 ¶ 3B and C; Count 2 ¶¶ 49, 50.)

In December 1996, before the SOS Office began the bidding process on the digital licensing contract, Warner guaranteed Associate 1 payments totaling $36,000 in 1997 if Associate 1 agreed to assist Warner on behalf of Viisage. Warner also purchased Viisage stock and advised another SOS Office employee to do the same. On June 2, 1997, Ryan awarded the digital licensing contract to Viisage through approximately 2004 and, shortly thereafter, Warner "caused the financial interest in the lobbying contract with Viisage to be assigned explicitly to Warner's business."[36] Between 1999 and November 2002, Warner received approximately $800,000 in revenues related to the lobbying contract. In addition, beginning in 1999, Warner paid Associate 1 $36,000 from Warner's Viisage proceeds. Neither Warner nor Associate 1 registered as lobbyists for Viisage. (*Id.* Count 2 ¶¶ 47B, 51-56.)

5. Automated System Consulting Contract

In 1991, the SOS Office decided to install a heating and cooling system for certain State Capitol Complex buildings in Springfield, Illinois. Between early 1992 and October 1994, the SOS Office "sought to award a series of engineering consulting contracts for assistance with preparing the specifications and consultations with regard to the contractual process related to the automated heating and cooling

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[36] The second superseding indictment does not specify which of Warner's businesses was assigned the financial interest in Viisage.

system." (*Id.* Count 2 ¶ 57.) Warner learned about the automated system consulting contract and, in December 1991, solicited a Northbrook-based company, Affordable Temperature Control ("ATC"), to provide the consulting services. Warner then told a high-ranking SOS Office official in the Physical Services Department ("SOS Official E") that ATC was to receive the automated system consulting contract. SOS Official E followed Warner's instruction, understanding him to be acting with Ryan's authority. (*Id.* Count 2 ¶ 58-60.) Thereafter, Warner notified ATC that he expected to recover 8% of ATC's revenues under the automated system consulting contract. Between June 1992 and October 1994, Warner received approximately $8,240 from ATC. Warner was identified as the company's "sponsor" on Fawell's "master list" of official acts performed on behalf of, or relating to, particular "sponsors." (*Id.* Count 2 ¶¶ 62-64.)

6. Photocopier Leases

The SOS Office had leases with one or more vendors for the use and service of photocopier machines. In mid-1991, Warner learned that Modern Business Systems, Inc., which held several of the photocopier leases, was attempting to win future additional leases with the SOS Office. On July 16, 1991, Warner, representing that he was an agent of the SOS Office, solicited Modern Business Systems to pay him $2,000 per month in return for his guarantee that the company would be awarded additional business with the SOS Office. An official with Modern Business Systems declined. (*Id.* Count 2 ¶¶ 65-67.)

7. Real Property Leases

The second superseding indictment also charges Ryan and Warner with influencing SOS Office leasing and purchasing of real property for personal gain. In 1991, Warner learned that the SOS Office was seeking to relocate certain of its administrative office facilities then located at 188 West Randolph Street in Chicago. In April, Warner "caused a contract to be entered into" with an individual associated with property at 17 North State Street in Chicago ("Property Manager 1"). The contract, executed by a third party to conceal Warner's involvement, gave Warner a 6% commission interest in any SOS Office lease relating to 17 North State Street. (*Id.* Count 2 ¶¶ 69-72.) On October 22, 1991, Ryan and Warner arranged for a six-year lease on the 17 North State Street property, which was renewed for an additional six-year term in 1998, again with a 6% commission for Warner. Between October 1991 and at least October 2001, Warner received approximately $383,276 in commission payments relating to the 17 North State Street lease. He was also identified on Fawell's "master list" as the lease's "sponsor." (*Id.* Count 2 ¶¶ 73-76.)

On October 15, 1992, Warner obtained an ownership interest in a building at 405 North Mannheim Road in Bellwood, Illinois, concealing the interest through a third-party nominee. On December 15, 1992, Ryan authorized the SOS Office to enter a five-year lease of the Bellwood facility and to renew the lease in March 1998 for another five-year term. Between December 1992 and March 2003, Warner received approximately $171,000 in proceeds related to the Bellwood lease. (*Id.* Count 2 ¶¶ 80-82.) On October 31, 1994, Warner also obtained a substantial

ownership interest in a building at 605 Maple Road in Joliet, Illinois, again concealing his interest by using a third-party nominee. On January 1, 1995, Ryan, who had instructed a high-ranking SOS Office official to help Warner find a building for the new lease, authorized the SOS Office to enter a four year lease of the Joliet facility. Between January 1995 and March 1999, Warner received approximately $387,500 in proceeds relating to that lease. (*Id.* Count 2 ¶¶ 84, 86-88.)

C. Lease Involving Associate 2

Between 1993 and at least 2002, Associate 2 provided personal and financial benefits to Ryan, including "annual vacation-related benefits." (*Id.* Count 2 ¶ 89.) Specifically, Ryan received free lodging each year at Associate 2's Jamaican vacation home and, on at least two occasions, at Associate 2's Palm Springs, California home. All told, Associate 2 gave Ryan $1,000 - $2,000 in lodging benefits each year. (*Id.*) Fawell received similar lodging benefits from Associate 2 between 1994 and 1998. (*Id.* Count 2 ¶ 90.) To conceal these benefits, Ryan would tender a check to Associate 2 in the amount of the lodging benefit and Associate 2 would give him back an equal amount in cash.[37] (*Id.* Count 2 ¶ 95.)

In 1997, Ryan contacted Associate 2 and proposed that the SOS Office lease a commercial building located in South Holland, Illinois which was owned by an entity controlled by Associate 2. Ryan was directly involved in negotiating the lease, and both he and Fawell approved final terms and conditions that

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[37] The second superseding indictment does not specify whether Fawell engaged in a similar "tender-back" arrangement.

were not standard in SOS Office leases but which benefitted Associate 2. (*Id.* Count 2 ¶¶ 91-93.) Between May 1997 and June 2002, Associate 2 received approximately $600,000 in lease payments from the SOS Office. (*Id.* Count 2 ¶ 94.) Between August 26, 1997 and January 2002, Ryan and Fawell continued to receive free lodging benefits from Associate 2, which Ryan intentionally concealed by (1) failing to disclose them as gifts and financial benefits "as required by law," and (2) making false and misleading statements to federal investigators when they asked him about "financial arrangements involving his vacations with Associate 2" during a January 2000 interview. (*Id.* Count 2 ¶¶ 96-97.)

D. Official Acts Relating to Associate 1

According to the second superseding indictment, Associate 1 also provided personal and financial benefits to Ryan and his family members between mid-1990 and 2002. These included "[m]onetary payments and gifts on multiple occasions to defendant Ryan which payments and gifts exceeded the $50 threshold" allowed by SOS Office policy (*Id.* Count 1 ¶ 2J); "[v]acation benefits to defendant Ryan, including benefits associated with a 1995 trip to Cancun, Mexico"; and "[Offs and personal service benefits to Ryan's family members, including a $2,200 vacation benefit to a Ryan daughter's family in 1999." (*Id.* Count 2 ¶ 98.) In exchange for these benefits, Ryan allegedly took official action to benefit Associate 1, described below.

In 1995 and again in 1997, Ryan authorized the SOS Office to enter into leases of certain property in Springfield, Illinois, with commission payments exceeding $38,000 going to Associate 1. (*Id.* Count 2 ¶

101.) In addition, in late 2000, the Governor's Office, together with the Illinois Department of Corrections ("IDOC"), began searching for a location to construct a maximum security prison. On February 23, 2001, Ryan chose the town of Grayville, Illinois as the prison site. He did not notify the public but did inform Associate 1. Shortly thereafter, Associate 1 entered into an agreement with a representative of a business group affiliated with Grayville to lobby for the selection of Grayville as the prison site in exchange for $50,000 in lobbying fees. Ryan announced the Grayville site selection at a public ceremony on April 12, 2001. (*Id.* Count 2 ¶¶ 102-07.)

In mid-1999, Wisconsin Energy was seeking to hire a lobbyist in Illinois to handle various regulatory and governmental issues in connection with a proposed project in the state. An "intermediary" acting on behalf of Wisconsin Energy solicited Udstuen's recommendation for an Illinois lobbyist. Udstuen conferred with Ryan, who agreed that Udstuen should recommend Associate 1. After Associate 1 was hired as Wisconsin Energy's lobbyist, he gave Udstuen a $4,000 cash payment while in the men's bathroom of a Chicago restaurant. Associate 1 told Udstuen that he was also "taking care" of Ryan. (*Id.* Count 2 ¶¶ 108-12.)

Finally, in 1999, Ryan directed that Associate 1 be hired as a lobbyist for the Metropolitan Pier and Exposition Authority ("MPEA"), an entity that received annual public funding and had officers and directors that were jointly appointed by the Governor and the Mayor of the City of Chicago. MPEA and its principal lobbying firm ("Firm A") were not looking for additional lobbyists at the time. Nevertheless, on January 1, 2000, Firm A hired Associate 1 as a "sub-

lobbyist" with an annual retainer of $60,000. This relationship continued for three years until December 31, 2002. (*Id.* Count 2 ¶¶ 113-15.)

E. Awarding of Low Digit Plates

The SOS Office was responsible for issuing license plates to qualifying individuals, including certain low-digit or specialty license plates that were not generally available to the public. From January 1991 to January 1999, Ryan personally approved the award of the most coveted low-digit plates. For example, in October 1990, shortly before Ryan's election as Secretary of State in November, Ryan solicited a $75,000 loan from "an individual known to Ryan" ("Individual 3"). Individual 3 arranged for such a loan to be paid to Citizens For Ryan through a friend of his; the loan was repaid in full within two weeks, with no interest charges.[38] In early 1991, Ryan awarded both Individual 3 and his friend low-digit plates as a reward for their efforts in securing the loan. (*Id.* Count 2 ¶¶ 116-18.)

From March 1996 through December 1998, Ryan also awarded Individual 1 a number of low-digit plates "while receiving, annually, at least $500 or more in personal checks from Individual 1." (*Id.* Count 2 ¶121.) On September 5, 1997, Individual 1 spoke to Ryan at a Chicago social event and expressed an interest in contributing $2,000 to his gubernatorial campaign. To conceal the contribution, Individual 1 made out four $500 checks to Ryan and certain Ryan family members. As a result, Ryan avoided his obligation under the Illinois

[38] The second superseding indictment does not explain why Citizens For Ryan needed a $75,000 loan for only a two-week period.

Governmental Ethics Act to disclose gifts from any entity valued singly or in the aggregate in excess of $500. 5 ILCS 420/4A-102. (*See also* SSI, Count 1 ¶ 2F.) Ryan also accepted gifts from Individual 1 in December 1997 and December 1998 in violation of SOS Office policy. He failed to disclose the financial benefits he received from Individual 1 until after federal investigators questioned him on October 16, 2000. (*Id.* Count 2 ¶¶ 122-24.)

According to the second superseding indictment, Warner was also involved in awarding low-digit plates to friends and associates in exchange for political favors. In early 1991, he advised Ryan to "keep close track of how low digit plates were issued" and to use the plates as a "plum." (*Id.* Count 2 ¶ 125.) From the early 1990s through late 1998, Ryan approved Warner's requests for low-digit plates for Warner's business associates and clients, and employees of his private business. Warner then solicited some of the individuals who received low-digit plates to make campaign contributions to Citizens For Ryan. (*Id.* Count 2 ¶¶ 126, 127.) All told, Ryan awarded more than 90 low-digit license plates to Warner and to third parties acting through Warner. (*Id.* Count 2 ¶ 129.)

F. Reorganization of the Inspector General Department

From 1991 through at least 1998, Citizens For Ryan sponsored annual political fundraising events that "relied upon SOS Office personnel selling political fundraising tickets." (*Id.* Count 2 ¶ 130A.) As SOS Office chief of staff, Fawell mandated political fundraising "goals" for SOS Office departments. Aware of these goals, certain SOS Office employees,

including supervisory employees in the Driver Services Department and Vehicle Services Department, individually sold thousands of dollars in fundraising tickets on behalf of Citizens For Ryan. Each year, Ryan rewarded SOS Office employees who had sold substantial numbers of political fundraising tickets by attending special ceremonies to acknowledge top ticket sellers and by having his picture taken with them. (*Id.* Count 2 ¶¶ 130B, 130C.)

According to the second superseding indictment, Ryan and Fawell knew by December 1994 that agents of the Inspector General ("IG") Department were investigating alleged official misconduct by employees of the Drivers Services Department and the Vehicle Services Department relating to the sale and distribution of fundraising tickets for Citizens For Ryan. Specifically, in March 1993, the IG Department had investigated SOS Office employees of the Libertyville driver's license facility and seized a briefcase containing cash and fundraising tickets from the governmental office of an employee suspected of criminal activity. On March 9, 1993, the Inspector General told Ryan that IG Investigators "had located fundraising-related evidence in the SOS Office employee's governmental office." In late March 1994, the IG Department had investigated allegations, "aired on local television," that an SOS Office employee had solicited an auto parts dealer who was regulated by the SOS Office for fundraising tickets during state working hours. Those allegations were allegedly communicated to Ryan.[39] In April

[39] The second superseding indictment does not indicate who communicated the allegations to Ryan or when that allegedly occurred.

1994, the IG Department had investigated official misconduct[40] by an employee in the SOS Office's Naperville licensing facility. On April 26, 1994, an IG Investigator called Ryan and told him that the Naperville employee's alleged misconduct "may have been motivated by sales of Citizens For Ryan fundraising tickets." Finally, in November 1994, IG Investigators had learned that a driver involved in a widely-publicized fatal traffic incident may have obtained his commercial driver's license illegally at the McCook driver's license facility. The Inspector General allegedly notified high-ranking SOS Office officials of these allegations. (*Id.* Count 2 ¶ 130D.)

In a December 1994 internal memorandum not intended for public disclosure, Fawell recommended to Ryan that certain IG Investigators be terminated and reassigned to discourage further investigations into improper political fundraising activities. Ryan agreed and Fawell drafted written memoranda falsely justifying the decision based on budgetary cutbacks. From February through June 1995, most of the IG Investigators were in fact terminated or reassigned. As a result, Ryan and Fawell disabled the IG Department and "substantially hindered it from fulfilling its duties to, among other things, investigate all allegations of SOS Office misconduct, including allegations linked to fundraising efforts of Citizens For Ryan." (*Id.* Count 2 ¶¶ 131-35.)

G. Diversion of State Resources to Benefit Ryan

Between 1992 and 1998, Ryan, Fawell, and others allegedly authorized the diversion of SOS Office

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[40] The second superseding indictment does not describe the exact nature of the "official misconduct."

resources to benefit Ryan personally and Citizens For Ryan. For example, Ryan, Fawell, and another high-ranking SOS Office official, Richard Juliano, participated in the campaign effort of then-Texas Senator Phil Gramm, who was running for president of the United States in 1995-96. Ryan proposed that certain individuals receive "consulting" payments related to the Gramm campaign in Illinois, with Ryan, Fawell, and Juliano splitting the money. Fawell and Udstuen helped Ryan recruit Alan Drazek to participate in the Gramm campaign and used Drazek's company (AMR) as a conduit to funnel the consulting payments to Ryan, Fawell, and Juliano. (*Id.* Count 2 ¶¶ 136-40.) In addition, Fawell, Juliano, and other SOS Office employees working at the direction of Fawell and Juliano performed campaign work on state time and using state resources, such as participating in campaign meetings, phone conferences, political fundraisers, organizational meetings, strategy sessions, and public appearances with Gramm. Ryan allegedly knew about and authorized these activities. (*Id.* Count 2 ¶ 141.)

Between September 1995 and March 1996, the indictment claims, Ryan, Fawell, and Juliano caused over $32,000 in payments to be made from the Gramm campaign through AMR to individuals and entities designated by them. Ryan directed his share of the "consulting" payments to certain family members who had not performed any bona fide services for the Gramm campaign. (*Id.* Count 2 ¶ 142.) Ryan concealed the benefits he received from the Gramm campaign by omitting the income from his 1995 and 1996 Statement of Economic Interest forms and tax returns. (*Id.* Count 2 ¶ 143.)

H. Obstructing the Grand Jury Investigation

The second superseding indictment also charges Ryan with concealing misconduct and obstructing a Grand Jury Investigation into allegations of misconduct, corruption, and fraudulent conduct relating to the SOS Office, the Governor's Office, and related entities and individuals. (*Id.* Count 1 ¶ 4.) In September 1998, after learning about the Grand Jury Investigation, Fawell directed SOS Office employees, including William Mack, to "clean up" Citizens For Ryan-related documents on SOS Office premises. Ryan was present when Fawell gave this instruction. (*Id.* Count 2 ¶ 145.) Mack gathered a number of SOS Office employees and directed them to shred "voluminous amounts of material," filling numerous garbage bags that were subsequently transported out of the office. Afterwards, Mack contacted Ryan and Fawell to inform them that the SOS Office had indeed been "cleaned up." (*Id.* Count 2 ¶¶ 146, 147.)

In addition to this shredding incident, Ryan is charged with making material false statements in three interviews with law enforcement agents from the Federal Bureau of Investigations ("FBI") who were conducting the Grand Jury Investigation. In a January 5, 2000 interview, Ryan allegedly made false material statements about the vacation benefits he received from Associate 2; the lease of Associate 2's property in South Holland, Illinois; the Joliet lease involving Warner's property; his decision to appoint Warner to the McPier board[41]; and the Libertyville raid regarding the fundraising tickets. (*Id.* Count 2 ¶

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[41] The second superseding indictment does not provide any information regarding the McPier board, its purpose, or its membership.

148A.) In an October 16, 2000 interview, Ryan allegedly made false material statements by claiming that he had no personal knowledge of Warner's interest in the Joliet lease; that he had no idea how Warner had advance knowledge that the SOS Office was looking to lease property in Joliet; and that he had no personal financial relationship with Warner. (*Id.* Count 2 ¶ 148B.) In a February 5, 2001 interview, Ryan allegedly made false material statements with respect to a conversation he had on a boat trip with Individual 1, which led to his receiving four $500 checks. Specifically, Ryan falsely claimed that he did not give Individual 1 the name and address of his son and daughter-in law, who were identified as payees on certain of the checks. (*Id.* Count 2 ¶ 48C.)

I. The Criminal Charges

Count One of the second superseding indictment charges Ryan, Warner, and "others known and unknown to the Grand Jury" with conspiring to commit a pattern of racketeering activity involving multiple acts of mail fraud, money laundering, extortion, obstruction of justice, and bribery, as set forth above. (*Id.* Count 1 ¶ 8.) As part of the conspiracy, Warner and other Associates allegedly provided personal and financial benefits to Ryan, his family, and Citizens For Ryan in exchange for Ryan's exercising his official authority to benefit Warner and the Associates. (*Id.* Count 1 ¶¶ 9-12.) Defendants improperly concealed these actions by structuring cash withdrawals to avoid the filing of currency transaction reports; paying funds to third parties who acted as conduits and nominees; and paying cash and writing checks to cash. (*Id.* Count 1 ¶ 13.) Counts Two through Five and Seven through Nine charge

that, by their actions described above, Ryan and Warner schemed to defraud the people of the State of Illinois and the State of Illinois of money, property, and the honest services of Ryan and other state officials in violation of the mail fraud statute, 18 U.S.C. §§ 1341, 1346. Counts Six and Ten charge Ryan with two additional counts of mail fraud.

In counts Eleven through Thirteen, Ryan is charged with making materially false, fictitious, and fraudulent statements during interviews with the FBI on January 5, 2000, October 16, 2000, and February 5, 2001. Count Fourteen charges Warner with extortion by knowingly attempting to obtain payments from American Decal Manufacturing under color of official right using threats of economic harm. 18 U.S.C. § 1951. Counts Fifteen and Sixteen charge Warner with money laundering by funneling illegal proceeds from the validation stickers contract and computer-related contracts through Drazek's company, AMR. 18 U.S.C. § 1956 (a)(1)(B)(i). Count Seventeen charges Warner with structuring currency transactions in violation of 31 U.S.C. §§ 5324(a)(3) and (d)(2). Specifically, to avoid the reporting requirements of 31 U.S.C. § 5313(a), Warner allegedly structured the withdrawal of $14,000 from his Omega Consulting Group Ltd. checking account into two separate transactions – one in the amount of $9,000 on August 4, 1997, and a second in the amount of $5,000 on August 5, 1997 – at different branches of the North Community Bank.

Count Eighteen charges that Ryan attempted to, and did in fact obstruct the IRS in the correct reporting of income and the assessment and collection of taxes. Specifically, Ryan allegedly (1) used Citizens For Ryan funds to pay his and certain

family members' personal expenses and to provide personal gifts, such as payments for travel expenses, for the benefit of third parties (SSI, Count 18 ¶ 4); (2) caused income that he was receiving from Citizens For Ryan and third parties to be diverted to others, thereby depriving the IRS of accurate information regarding his income (*Id.* Count 18 ¶ 5); (3) concealed benefits he received from the Gramm campaign (*Id.* Count 18 ¶¶ 14-20); and (4) received money from political supporters, which he used for personal expenses but failed to report as income. (*Id.* Count 18 ¶¶ 23, 24.) Counts Nineteen through Twenty-Two charge Ryan with filing false tax returns and amended returns that understated his gross income.

Ryan and Warner have filed 20 separate motions seeking, among other things, dismissal of the RICO conspiracy and mail fraud charges. The court addresses each motion in turn.

DISCUSSION

A. Defendants' Motions to Dismiss RICO Charge

Ryan and Warner have separately moved to dismiss the RICO conspiracy charge against them. Ryan claims that the State of Illinois is not a proper "enterprise" under the statute; that the government has failed to allege a single enterprise; that the government has improperly alleged multiple conspiracies; and that the State cannot be both the RICO "enterprise" and "victim." Warner argues that the RICO charge is deficient because it fails to specify the predicate racketeering acts agreed upon by Defendants in furtherance of the conspiracy.

1. The State as a RICO Enterprise

To plead a RICO conspiracy under 18 U.S.C. § 1962(d), an indictment must allege that (1) the defendants agreed to participate in the affairs of an enterprise through a pattern of racketeering activity, and (2) the defendants further agreed that someone would commit at least two predicate acts to accomplish those goals. *Slaney v. International Amateur Athletic Federation*, 244 F.3d 580, 600 (7th Cir. 2001). The definition of enterprise in the RICO statute is broad, including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256-57 (1994) (quoting 18 U.S.C. § 1961(4)).

The second superseding indictment alleges that the RICO "enterprise" is the State of Illinois. (SSI, Count 1 ¶ 5.) Ryan argues that a sovereign state cannot be an enterprise under the statute, directing the court to *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976). In Mandel, the former governor of Maryland was charged with, among other things, engaging in patterns of racketeering activity and mail fraud by conducting and participating in the affairs of the State of Maryland in a manner that personally benefitted himself and his co-defendants. *Id.* at 1018. The defendants objected to the indictment on several grounds, including that the State of Maryland could not be a RICO enterprise. *Id.* at 1020. The court first noted that the legislative history of RICO is silent as to whether public entities such as governments and states may be considered "enterprises," and that there is no indication that

Congress was concerned about the use of violent and criminal tactics to subvert states or governments. *Id.* The court next concluded that applying the statutory remedies to public entities "would clearly result in what could only be characterized as a startling departure from the traditional understanding of federal-state relationships." *Id.* at 1021. As an example, the court considered a scenario in which "a private citizen of a state, aggrieved by the 'racketeering acts' of an official in conducting the state, could bring a treble damage action against that official and require forfeiture of office and dissolution of the state government." *Id.* The court further explained that because "States have their own adequate resources to combat threats to their integrity leveled by organized crime," it is "simply untenable to argue that Congress, without saying so, intended to federalize crimes involving the acts of a public official in conducting the government of a state." *Id.* Having concluded that the State of Maryland was not an enterprise, the court dismissed the RICO count of the indictment. *Id.* at 1022.

The parties in Mandel never appealed the court's ruling that public entities cannot be RICO enterprises and, technically, the case remains good law. The reasoning behind that decision, however, has been roundly criticized by other courts. In *United States v. Long*, 651 F.2d 239 (4th Cir. 1981), for example, the Fourth Circuit, which hears appeals from the District of Maryland, expressed its "disapproval" of Mandel and held that a South Carolina State Senator's legislative seat constituted a RICO enterprise. In concluding that enterprise "should be construed to include public entities," the court noted that the definition of that term in §

1961(4) does not differentiate between public and private individuals or entities, and emphasized that the congressional statement of purpose and findings in the statute "denounces racketeering activities because, among other evils, they 'subvert and corrupt our democratic processes.'" *Id.* at 241 (citing *United States v. Altomare*, 625 F.2d 5 (4th Cir. 1980) (state prosecutor's office constitutes an enterprise)). In the Fourth Circuit's view, nothing in the Act "threatens the discretion state officials must exercise in the discharge of their duties." *See also United States v. Angelilli*, 660 F.2d 23, 31 and 33 n.10 (2d Cir. 1981) (rejecting *Mandel* and finding that the New York City Civil Court was a RICO enterprise); *United States v. Clark*, 646 F.2d 1259 (8th Cir. 1981) (rejecting *Mandel* and finding that the office of county judge and the government of Craighead County, Arkansas was a RICO enterprise); *United States v. Frumento*, 563 F.2d 1083, 1090 (3d Cir. 1977) (rejecting *Mandel* and finding that Pennsylvania Bureau of Cigarette and Beverage Taxes was a RICO enterprise).

Other courts similarly agree that governmental and public entities do in fact qualify as enterprises under the racketeering statutes. *See United States v. Conn*, 769 F.2d 420, 424-25 (7th Cir. 1985) (jury fairly concluded that defendant "conducted the affairs of the enterprise[, the Cook County Circuit Court,] through racketeering"); *United States v. Kovic*, 684 F.2d 512, 516 (7th Cir. 1982) ("governmental or public entities [such as the Chicago Police Department] fit within the definition of 'enterprise' for purposes of RICO"); *Evans v. City of Chicago*, No. 00 C 7222, 2001 WL 1028401, at *8 (N.D. Ill. Sept. 6, 2001) (indictment sufficiently alleged that defendants used the Chicago Police Department as the vehicle

through which they carried out their agreement to intimidate and retaliate against the plaintiff); *DeFalco v. Bernas*, 244 F.3d 286, 309 (2d Cir. 2001) (jury "could have reasonably found that the Town of Delaware was a 'passive instrument' through which the defendants wielded power for their personal benefit and, accordingly, was a RICO enterprise"); *United States v. Brown*, 555 F.2d 407, 415-16 (5th Cir. 1977) (Macon police department was an enterprise).

Ryan concedes the "broad proposition" that "enterprise" is not limited to private entities but argues that it does not extend to entire states. (Ryan RICO Mem., at 6-7)[42] He first claims that identifying the State of Illinois as the RICO enterprise "'needlessly cast[s] unfair reflection upon innocent individuals,' namely, the People of the State of Illinois." (*Id.* at 7) (quoting *United States v. Thompson*, 685 F.2d 993, 1000 (6th Cir. 1982)). To the extent that an enterprise is merely the vehicle through which defendants conducted alleged illegal activity, this argument has no merit. "A major purpose of the RICO statute was to protect legitimate enterprises by attacking and removing those who had infiltrated them for unlawful purposes." *United States v. McDade*, 28 F.3d 283, 296 (3d Cir. 1994) (emphasis in original) (citing *Russello v. United States*, 464 U.S. 16, 28 (1983)) ("Congress viewed the RICO statute in large part as a response to organized crime's infiltration of legitimate enterprises"). Consistent with this goal, the government is seeking

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[42] Defendant Ryan's Memorandum of Law in Support of his Motion to Dismiss the RICO Charge is cited as "Ryan RICO Mem., at __."

to prove that Ryan and Warner infiltrated legitimate state government and defrauded the citizens of Illinois. The mere fact that other State employees may somehow be cast in a negative light – a potential side-effect of any case involving a governmental enterprise – in no way establishes that the definition of enterprise does not include a State.

Ryan next argues that the plain language of the statute and its legislative history demonstrate that Congress never intended for a state to be deemed an enterprise. (Ryan RICO Mem., at 8.) Much of this argument follows the rationale of *Mandel* which, as noted, has been criticized. For example, Ryan notes that the statutory definition of "enterprise" does not include States or other sovereign governments, instead setting forth "a number of the 'common legal forms in which business entities and labor groups fashion themselves to carry out their private functions." *Id.* (quoting *Mandel*, 415 F. Supp. at 1021). These legal forms include partnerships, corporations, associations, and "other legal entit[ies]." 18 U.S.C. § 1961(4). Relying on the doctrine of *ejusdem generis*, which presumes that all items named are of the same type and class, Ryan insists that "[t]he more general reference[] to 'any legal entity' . . . must be construed to be limited to the same type and class of entities which preceded it in the statutory definition." (Ryan RICO Mem., at 8) (quoting *Mandel*, 415 F. Supp. at 1021). From there, Ryan argues that, "constru[ing] the broad in light of the narrow," § 1961(4) does not encompass the State of Illinois. *Id.*

The problem with this argument is that courts have uniformly held that Congress intended RICO to apply to activities that corrupt public or

governmental entities, making resort to *ejusdem generis* unnecessary. *See, e.g.*, Angelilli, 660 F.2d at 33 n.10 (rejecting application of *ejusdem generis* to limit RICO enterprises to private entities where "we believe the congressional intent appears clearly to the contrary"); *Frumento*, 563 F.2d at 1090 (quoting *State of Texas v. United States*, 292 U.S. 522, 534 (1934)) ("[t]he rule of '*ejusdem generis*' is applied as an aid in ascertaining the intention of the legislature, not to subvert it when ascertained"). Ryan urges that the legislative history of RICO nonetheless evidences an intent that Title I of the statute, which sets forth procedures for special grand juries, "would serve as the primary vehicle for fighting political corruption," not Title IX as charged in the second superseding indictment. (Ryan RICO Mem., at 9-10.) This theory similarly ignores clear precedent to the contrary. *See* Conn, 769 F.2d at 424-25 (Cook County Circuit Court was enterprise for purposes of charge under 18 U.S.C. § 1962(c)); *United States v. Ambrose*, 740 F.2d 505, 512 (7th Cir. 1984) (Chicago Police Department was enterprise in § 1962(c) case); McDade, 28 F.3d at 295-96 (Congressman McDade and his Congressional offices in Washington, D.C., and in the 10th Congressional District of Pennsylvania constituted an enterprise in § 1962(c) case).

Ryan next posits that reading § 1961(4) to include states would lead to "absurd and anomalous results" because the civil and criminal RICO remedial provisions authorize courts to dissolve or reorganize an enterprise. In Ryan's view, "[i] would truly be absurd to suppose that Congress intended to give federal courts the authority to dissolve or reorganize a sovereign State." (Ryan RICO Mem., at 10-11.) As the Supreme Court explained in *United States v.*

Turkette, 452 U.S. 576 (1981), however, "even if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept. Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions." *Id.* at 585. Ryan objects that the mere existence of these "drastic remedies" suggests that "the statute's drafters never intended to encompass sovereign States within the statutory definition of enterprise." (Ryan RICO Reply, at 6.)[43] The same argument could be made, however, with respect to other governmental entities, such as governor's offices and cities, but courts have readily found that the statute applies to them. *See, e.g., United States v. Powell*, No. 87 CR 872-4, 1988 WL 40864, at *4 (N.D. Ill. Feb. 23, 1988) (Nordberg, J.) (City of Chicago was an enterprise).

In a final challenge to the State of Illinois' status as a RICO enterprise, Ryan argues that such a designation is "contrary to the basic notions of federalism and unnecessarily strains state-federal relations." (Ryan RICO Mem., at 11.) He claims that absent a clear Congressional statement that RICO applies to State "enterprises," there is no authority for treating them as such. (*Id.* at 12-13.) In support of this argument, Ryan notes that federal courts must "exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." (Ryan RICO Reply, at 7-8) (quoting *Burford v. Sun*

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[43] Defendant Ryan's Reply in Support of his Motion to Dismiss the RICO Charge is cited as "Ryan RICO Reply, at __."

Oil Co., 319 U.S. 315, 318 (1943)). As explained earlier, the fact that RICO does not expressly define "enterprise" to include public and governmental entities does not establish that the statute only applies to private entities.

The court recognizes the importance of state sovereignty and the significance of this decision, which has no direct controlling precedent. In other contexts, however, the Seventh Circuit has noted that "the legislative history [of RICO] manifests a serious concern by Congress not merely with a profusion of racketeering activities within private businesses and labor organizations . . . but with the potentially devastating effects of organized crime on the nation's political and economic system *as a whole*." *United States v. Grzywacz*, 603 F.2d 682, 687 (7th Cir. 1979) (emphasis added). As reflected in the cases already cited here, courts have found that cities and towns can constitute RICO enterprises and, even with due respect to the states' unique role in our system of federalism, the court is unable to identify a principled distinction between states and other public bodies in this context. In short, Ryan has not established to this court's satisfaction that an entire state cannot, in appropriate circumstances, also serve as a vehicle for the type of corruption RICO seeks to eradicate. Thus, Ryan's motion to dismiss the RICO charge on this basis is denied.

2. Allegations of a Single Enterprise

Ryan also seeks dismissal of the RICO conspiracy charges for failure to properly allege a single enterprise. To prove a single RICO conspiracy, the government must show that the defendants "agreed to conduct the affairs of the enterprise through the

commission of two predicate acts." *United States v. Maloney*, 71 F.3d 645, 664 (7th Cir. 1995). A series of agreements may be tried as a single "enterprise" conspiracy if the defendants have agreed to commit a substantive RICO offense. *Id.* "'So long as the alleged RICO co-conspirators have agreed to participate in the affairs of the same enterprise, the mere fact that they do not conspire directly with each other' does not convert the agreement to conduct the enterprise's affairs through a pattern of racketeering activity into multiple conspiracies." *Id.* (quoting *United States v. Friedman*, 854 F.2d 535, 562 (2d Cir. 1988)).

Ryan argues that even if the State of Illinois can generally constitute an enterprise, the government cannot use that entity "for the sole purpose of encompassing multiple, unrelated conspiracies within a single RICO charge." (Ryan RICO Mem., at 14.) In Ryan's view, the second superseding indictment alleges two separate conspiracies relating to two different enterprises. The first involves criminal acts that occurred while Ryan was Secretary of State (the "SOS Office conspiracy"); the second involves criminal acts that occurred while Ryan was Governor of Illinois (the "Governor's Office conspiracy"). (Ryan RICO Mem., at 13.) The SOS Office conspiracy, Ryan says, consisted of three separate schemes: (1) one by Ryan, Warner, and Udstuen involving contracts and leases with the SOS Office; (2) one by Ryan, Warner, and others relating to low-digit license plates; and (3) one by Ryan, Fawell, and others engaged in various activities relating to the SOS Office. (*Id.* at 14-15.) The Governor's Office conspiracy allegedly consisted of Ryan, Associate 1, and Udstuen and involved (1) Associate 1's efforts in lobbying for Grayville as the site of a new prison after that site, unbeknownst to

the public, had already been selected; (2) lobbying contracts for Associate 1 related to Wisconsin Energy; and (3) Associate 1's hiring as a lobbyist for the Metropolitan Pier and Exposition Authority. (*Id.* at 14.)

Ryan directs the court to prior indictments in related cases as evidence that there is no single enterprise conspiracy here. In the first superseding indictment against Warner, for example, the core allegation was that Warner and others engaged in a scheme to defraud the people of the State of Illinois, the State of Illinois, and the SOS Office of the honest services of "SOS Official A." The alleged enterprise consisted of Warner, two of his businesses, the Office of the Secretary of State, and Udstuen. (First Superseding Indictment, ¶¶ 1(V), 2.) The second superseding indictment similarly charges Ryan and Warner with scheming to defraud the people of the State of Illinois and the State of Illinois of money, property, and the honest services of Ryan, but the enterprise is now the State of Illinois. (Ryan RICO Mem., at 15.) In *United States v. Fawell*, No. 02 CR 310, Fawell was charged with using SOS Office resources for political purposes and reorganizing the Inspector General's office, much like the allegations in this case. (Fawell Indictment, ¶¶ 136-44, 130-35.) The RICO enterprise in Fawell, however, consisted of an association in fact between Fawell, Citizens For Ryan, the SOS Office, and others. (*Id.* ¶ 2.)

In this court's view, Ryan's argument is basically another challenge to the viability of a RICO enterprise consisting of the State of Illinois. It is true that the second superseding indictment alleges a pattern of racketeering activity that covers conduct from the time Ryan was Secretary of State through

his service as Governor of Illinois. The mere fact that Ryan changed elected offices, however, does not require a finding that he and his co-defendants acted through more than one enterprise. Nor is the court persuaded that the government is constrained by allegations set forth in earlier indictments. At this stage of the proceedings, the court cannot say that no reasonable jury could conclude that Defendants conspired to commit predicate acts of racketeering through the State of Illinois.

3. Multiple Conspiracies

Ryan next asserts that the indictment improperly combines multiple, unrelated conspiracies into a single conspiracy without the necessary interrelationship between the alleged wrongdoing. (Ryan RICO Mem., at 18.) "Multiple conspiracies exist when there are separate agreements to effectuate distinct purposes," whereas a single conspiracy exists when "the evidence, viewed in the light most favorable to the government, establishes that the co-conspirators joined to effectuate a common design or purpose." *United States v. Ceballos*, 302 F.3d 679, 688 (7th Cir. 2002). "So long as the evidence demonstrates that the co-conspirators embraced a common criminal objective, a single conspiracy exists, even if the parties do not know one or another and do not participate in every aspect of the scheme." *United States v. Jones*, 275 F.3d 648, 652 (7th Cir. 2001).

Ryan claims that there is no interrelationship between the "various SOS Office conspiracies" and the Governor's Office conspiracy. As described earlier, the former includes: (1) the conspiracy between Ryan and Warner to have Ryan act in his official capacity

to personally benefit himself, Warner, and other Associates (SSI, Count 1 ¶¶ 11-13); (2) the conspiracy between Warner and unnamed "others" to extort vendors and prospective vendors of the SOS Office (*Id.* Count 1 ¶ 14); and (3) the conspiracy between Ryan, Fawell, and agents of Citizens For Ryan to use SOS Office resources for their personal benefit. (*Id.* Count 1 ¶¶ 15-17.) The latter consists of the conspiracy between Ryan, Associate 1, and Udstuen to have Ryan act in his official capacity to personally benefit himself, Associate 1, and Udstuen. (*Id.* Count 1 ¶¶ 11-12, Count 2 ¶¶ 102-15; Ryan RICO Mem., at 18.) According to Ryan, "it is far from evident from the face of the Indictment that the alleged conspirators engaged in the requisite 'agreement' to a single, unitary objective broad enough to encompass these disparate alleged acts." (*Id.*)

Ryan is correct that the second superseding indictment describes a variety of activities and objectives; nevertheless, in the court's view, the alleged conspiracies do not so easily separate into distinct groupings. For example, Udstuen was involved in the validation stickers contract and the computer contracts for the SOS Office while Ryan was Secretary of State, but he was also involved in the Wisconsin Energy lobbying scheme with Ryan and Associate 1 during the Governor years. Similarly, Associate 1 was involved in the digital licensing contract for the SOS Office, but he was also the beneficiary of the Grayville Prison, Wisconsin Energy, and Metropolitan Pier and Exposition Authority schemes while Ryan was Governor. In addition, several of Warner's and Ryan's alleged schemes that began in the Illinois SOS Office continued after Ryan became Governor. Specifically,

Warner and Udstuen received payments relating to the validation stickers contract until 2000; Warner and Associate 1 received payments relating to the digital licensing contract through November 2002; and Warner received payments relating to the 17 North State Street, Bellwood, and Joliet leases until at least October 2001, March 2003, and March 1999, respectively. The court is satisfied that the second superseding indictment sufficiently alleges an ongoing conspiracy to use state resources for personal gain. *See, e.g., United States v. Magana*, 118 F.3d 1173, 1190 (7th Cir. 1997) ("ongoing drug distribution conspiracy . . . involving core members who bought from and sold to various suppliers and dealers" constituted a single conspiracy rather than a series of smaller, separate conspiracies); *United States v. Stern*, 858 F.2d 1241, 1249 (7th Cir. 1988) (substitution of "players" in ongoing prostitution enterprise "did not alter the continuing nature of the single conspiracy"). Ryan's motion to dismiss the RICO charge for alleging multiple conspiracies is therefore denied.

4. The State as RICO Enterprise and Victim

Ryan finally argues that the State of Illinois cannot be both a RICO victim and part of the alleged enterprise. The court has twice rejected this same argument, first in *United States v. Fawell*, No. 02 CR 310, 2003 WL 21544239, at *1 (N.D. III. July 9, 2003), and again in this case prior to Ryan's addition as a defendant. *United States v. Warner*, 292 F. Supp. 2d 1051, 1067 (N.D. III. 2003). The court continues to recognize that the case law is unsettled on this issue but, following Judge Kocoras's rationale in *Shapo v. Engle*, No. 98 C 7909, 1999 WL 1045086, at *8-9 (N.D. III. Nov. 12, 1999), declines to find that an

indictment fails merely because it names the same entity as both a victim and a part of the enterprise.

5. Failure to Specify the Predicate Racketeering Acts

Warner additionally objects to the RICO charge on the theory that the indictment fails to "specifically identify the predicate racketeering acts that the defendants allegedly agreed would be committed in the conduct of the enterprise's affairs." (Warner RICO Mem., at 1.)[44] The government responds that under *United States v. Glecier*, 923 F.2d 496 (7th Cir. 1991), such specificity is not required. In Glecier, the defendants were charged with fifteen counts of conspiracy, mail fraud, and tax violations. *Id.* at 498. Glecier was not charged in the indictment with personally committing any predicate acts of racketeering and he claimed that such omission violated his fifth and sixth amendment rights. *Id.* at 499. The court disagreed, reasoning that

> [i]f the government were required to identify, in indictments charging violation only of section 1962(d), specific predicate acts in which the defendant was involved, then a 1962(d) charge would have all of the elements necessary for a substantive RICO charge. Section 1962(d) would thus become a nullity, as it would criminalize no conduct not already covered by sections 1962(a) through (c). Such a result, quite obviously,

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[44] Warner's Memorandum of Law in Support of Motion to Dismiss RICO Conspiracy Charge is cited as "Warner RICO Mem., at __."

> would violate the statutory scheme in which conspiracy to engage in the conduct described in sections 1962(a) through (c) is itself a separate crime.

Id. at 501. By alleging all essential elements of a RICO conspiracy, specifying the time period during which the conspiracy operated, the locations and principal actors in the conspiracy, the specific types of predicate acts that were committed, and the *modus operandi* of the conspiracy, the indictment sufficiently (1) stated the elements of the offense charged, (2) informed Glecier of the nature of the charge so he could prepare a defense, and (3) enabled him to evaluate any possible double jeopardy problems. *Id.* at 499, 500.

The second superseding indictment similarly sets forth the elements of the conspiracy and provides sufficient detail to allow Defendants to prepare a defense and evaluate any double jeopardy concerns. The indictment identifies the RICO enterprise, the purposes of the conspiracy, the types of racketeering acts involved (mail fraud, money laundering, extortion, and obstruction of justice), and the means and methods of the conspiracy. (Gov't Resp., at 21; SSI, Count 1 ¶¶ 5-17.)[45] It also provides details regarding the time period during which the conspiracy operated and the principal actors. In light of the government's representation that it will "request that the jury be instructed that in order to convict a defendant of the RICO conspiracy offense, the jury's verdict must be unanimous as to which *type*

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[45] The Government's Consolidated Response to Defendants' Pretrial Motions and Government's Motion for Reciprocal Discovery is cited as "Gov't Resp., at __."

or types of racketeering activity the defendant agreed would be committed," the foregoing allegations are adequate to allege a RICO conspiracy. (*Id.* at 21-22) (emphasis in original).

Warner also claims that Count One improperly charges an agreement to violate Illinois' official misconduct statute, 720 ILCS 5/33-3(d). He notes that official misconduct can only serve as a predicate act under RICO if it amounts to the generic equivalent of bribery, and argues that "absent the RICO conspiracy charge describing the underlying bribery or official misconduct activity, this Court cannot determine whether the alleged agreements to commit official misconduct were tantamount to bribery." (Warner RICO Mem., at 4, 5) (citing *United States v. Genova*, 333 F.3d 750, 758-59 (7th Cir. 2003)). The *Genova* court did hold that "§ 5/33-3(c) does not read like a definition of bribery and therefore may not be used as a predicate offense under RICO." 333 F.3d at 758-59. Section 5/33-3(d), however, which the government relies on in this case, does "define[ ] a species of bribery." *Id.* at 758 (citing *United States v. Garner*, 837 F.2d 1404, 1417-19 (7th Cir. 1987)). (*See also* SSI, Count 1 ¶ 8D) (charging Warner and Ryan with conspiring to engage in a pattern of racketeering activity involving, among other things, "multiple acts involving bribery chargeable under the following provisions of state law: 720 ILCS 5/33-1(c) and (d); and 5/33-3(d).) Thus, official misconduct under § 5/33-3(d) may serve as a predicate act of racketeering. Warner's motion to dismiss the RICO conspiracy charge is denied.

B. Ryan's Motion to Dismiss Mail Fraud Charges

Ryan seeks to dismiss the mail fraud charges against him on two theories: (1) the second superseding indictment improperly alleges "multiple schemes with different characteristics, different participants, and no legally sufficient nexus between them"; and (2) the intangible right of "honest services," 18 U.S.C. § 1346, is unconstitutionally vague on its face and as applied. The court addresses each argument in turn.

1. Multiple Schemes to Defraud

Ryan first claims that Count Two of the second superseding indictment is duplicitous because it combines multiple, unrelated schemes. "Duplicity" – i.e., "the joining of two or more offenses in a single count" – is prohibited by FED. R. CRIM. P. 8, which requires "a separate count for each offense." *United States v. Buchmeier*, 255 F.3d 415, 421 (7th Cir. 2001). As the Buchmeier court explained,

> [t]he overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or both. Additionally, we have explained that a duplicitous indictment may expose a defendant to other adverse effects including improper notice of the charges against him, prejudice in the shaping of evidentiary rulings, in sentencing, in limiting review on appeal, in exposure to double jeopardy, and of course the

> danger that a conviction will result from less than a unanimous verdict as to each separate offense.

Id. at 425 (internal quotations and citations omitted). *See also United States v. Caputo*, 288 F. Supp. 2d 912, 917 (N.D. Ill. 2003).

Ryan claims that the factual scenarios in Count Two demonstrate that there are "schemes of differing nature." For example, Ryan allegedly (1) authorized the SOS Office to enter into leases for properties owned by Warner, Ryan, and Associate 1; (2) gave confidential information to Associate 1 in connection with the construction of a maximum security prison in Grayville; and (3) authorized the termination of an Inspector General investigation into political fundraising by SOS employees on behalf of Citizens For Ryan. (Ryan Mail Fraud Mem., at 6.)[46] In Ryan's view, these schemes have no relation to each other except for his involvement in them. (*Id.*) Ryan also attempts to characterize the allegations as separate schemes to defraud the people of the State of Illinois of Ryan's honest services as the Secretary of State on the one hand, and as Governor on the other. (*Id.* at 7-8.)

The government responds that it has alleged just one scheme – to deprive the people of the State of Illinois and the State of Illinois of money, property, and their right to the honest services of Ryan and other state employees – that was merely executed in different ways. (Gov't Resp., at 27.) One method of

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[46] Defendant Ryan's Memorandum of Law in Support of his Motion to Dismiss the Mail Fraud Charges is cited as "Ryan Mail Fraud Mem., at __."

execution was that Ryan, in exchange for gifts and benefits for himself and his family, allegedly gave friends and associates, including Warner, access to non-public information that enabled them to benefit from government leases, contracts, and projects. Another method was that Ryan allegedly used state resources to further his political career, such as having state employees sell fundraising tickets for his political campaign and providing certain "plum" benefits (e.g., low-digit plates) in exchange for campaign assistance and contributions. (*Id.*) Ryan, Warner, and their associates also allegedly took deliberate actions to cover their trail, such as lying to FBI agents, destroying documents, and funneling illegal proceeds through Alan Drazek's company.

The court believes that the second superseding indictment sufficiently alleges a common scheme to defraud to avoid dismissal on grounds of duplicity. "[A]n indictment charging multiple acts in the same count, each of which could be charged as a separate offense, may not be duplicitous where these acts comprise a continuing course of conduct that constitutes a single offense." Buchmeier, 255 F.3d at 421. Ryan and Warner are charged with misusing State of Illinois resources for their personal gain, a scheme they carried out in a variety of ways, such as using non-public information to manipulate SOS Office contracts and leases, awarding low-digit plates in exchange for political contributions, and providing financial and job opportunities to associates in exchange for vacation and other personal benefits. The mere fact that these activities involved different individuals and entities does not render the charges duplicitous. *See United States v. Dumeisi*, No. 03 CR 664-1, 2003 WL 22757747, at *2 (N.D. Ill. Nov. 20,

2003) (citing *United States v. Folks*, 236 F.3d 384, 391 (7th Cir. 2001)) ("an indictment may properly include multiple factual scenarios to establish a single charged offense").

Ryan finds it significant that though earlier indictments encompass many of the same individuals and conduct referenced in the second superseding indictment, the government never before suggested a link between them. The first superseding indictment against Warner, for example, alleged the same misconduct relating to SOS Office contracts and leases as set forth in Count Two of the second superseding indictment. The *Fawell and Bauer*[47] indictments included allegations now found in Count Two regarding use of the SOS Office for political gain and reorganization of the Inspector General's Office. According to Ryan, "[n]owhere in the Warner and Fawell/Bauer indictments does the government allege any connection between these two alleged schemes." (Ryan Mail Fraud Mem., at 7.) The government responds that the prior indictments were "steps along the way to the government's uncovering the full scheme. Each indictment led to more evidence which filled in a more complete picture of the overarching fraud on the public." (Gov't Resp., at 28.)

The court agrees that the government is not bound by the earlier indictments and is free to expand and refine charges consistent with available evidence. Ryan objects that the government's "improper joining of multiple schemes into a single scheme also creates problems of ambiguous and, ultimately, improper jury findings." (Ryan Mail

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[47] *See United States v. Bauer*, No. 00 CR 81.

Fraud Reply, at 3.)[48] To be sure, drafting appropriate jury instructions and verdict forms in this complicated case will require particular care and attention. The court does not agree, however, that the complications dictate dismissal of the mail fraud charges. Such concerns may properly be addressed with jury instructions at trial. *See United States v. Adeniji*, No. 96 CR 259, 1997 WL 97725, at *2 (N.D. Ill. Feb. 27, 1997) (citing *United States v. Nava-Salazar*, 30 F.3d 788, 795 (7th Cir. 1994)) ("if it is warranted by the facts at trial, a jury instruction on the question of single and multiple schemes may be appropriate"). The second superseding indictment does not combine "isolated facts" nor allege a "series of disconnected swindles or of frauds that may have had merely a common actor or stage." *United States v. Reicin*, 497 F.2d 563, 570 (7th Cir. 1974); *United States v. Swinton*, 75 F.3d 374, 378 (8th Cir. 1996). Ryan's motion to dismiss the mail fraud charges is therefore denied.

2. Intangible Right of Honest Services

Section 1346 of the mail fraud statute prohibits "a scheme or artifice to deprive another of the intangible right of honest services." Ryan claims that this provision is unconstitutionally vague on its face and as applied; creates an impermissible common law crime; violates separation of powers; and violates core federalism principles. Courts, including this one, however, have routinely rejected such challenges to the application of "honest services" fraud. *See Fawell*, 2003 WL 21544239, at *3 (collecting cases that

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[48] Defendant Ryan's Reply in Support of his Motion to Dismiss the Mail Fraud Charges is cited as "Ryan Mail Fraud Reply, at __."

declined to find unconstitutional vagueness); *United States v. Genova*, 167 F. Supp. 2d 1021, 1037 (N.D. III. 2001) (citing *United States v. Bloom*, 149 F.3d 649, 655-56 (7th Cir. 1998)) ("misuse of a public position for private gain is the line that separates run of the mill violations of state law fiduciary duty from federal crime"). Absent contrary direction from the Seventh Circuit, the court declines to dismiss the mail fraud charges on these grounds.

Several other motions may be addressed more summarily.

C. Defendants' Motions to Sever

In an earlier ruling in this case, the court noted its history; Defendant Warner was indicted in 2002 and was prepared, after several delays, to proceed to trial in February of this year. Instead, as 2003 came to a close, the government filed a Second Superseding Indictment, asserting a number of additional charges and naming George H. Ryan as a second Defendant in the case. Mr. Ryan was not prepared to proceed to trial at that time. *See United States v. Warner*, No. 02 CR 506, 2004 WL 144125 (N.D. III. Jan. 16, 2004). In that earlier opinion, the court reviewed the standards for charging more than one defendant together under FED. R. CRIM. P. 8 and concluded that the standards of that Rule were satisfied here, where Warner and Ryan are charged with engaging together in a racketeering conspiracy and scheme to defraud. With grave reluctance, the court set a very long trial date, finding no other way to accommodate Ryan's need for sufficient time to prepare for trial, each Defendant's choice of counsel, the possible prejudice to either Defendant from serial trials, and the interest of the court, the government, and many trial witnesses in a

single proceeding. The court's own preference was and remains to proceed to trial with respect to both Defendants as early as September of this year.

Although Warner did not raise substantive objections to a joint trial at the time of the second superseding indictment, he does, as noted, do so now. Warner argues that the counts in which he and Ryan are both named are not sufficiently connected to those in which Ryan alone is named. He argues, in addition, that certain allegations in the false statement counts against Ryan give rise to *Bruton* violations, and, in the alternative, that the court should grant a severance under Rule 14. Ryan, too, moves for severance, arguing that the false statement counts (Counts Eleven through Thirteen) and tax counts (Counts Eighteen through Twenty-Two) are insufficiently connected to the remaining counts of the indictment, which allege RICO violations and mail fraud.

As misjoinder appears to be the most significant objection, the court begins there. Both Defendants argue that there is an insufficient relationship between the counts against Ryan alone and those in which both Defendants are named. The court is uncertain that Ryan has any standing to raise this challenge; there is little question that the counts against him "are connected with or constitute parts of a common scheme or plan" within the meaning of Rule 8(a). The cases Ryan cites in support of his motion address the right of the defendant not named in certain charges (in this case, Warner) to seek severance. *See United States v. Schweihs*, 971 F.2d 1302, 1321-22 (7th Cir. 1992) (characterizing the question as "whether [Rules 8(a) and 8(b)] can be combined" to allow joinder of charges against movant

Daddino with charges against Schweihs alone); *United States v. Velasquez*, 772 F.2d 1348, 1353 (7th Cir. 1985) (finding no prejudice from denial of a severance motion and observing that heroin charges could have been joined with other charges against the defendant charged with heroin trafficking alone). In any case, as the government points out, joinder of tax evasion counts with conspiracy charges is proper where the counts allege failure to report income received by the fraudulent scheme. *United States v. Shelton*, 669 F.2d 446, 460 (7th Cir. 1982); *United States v. Emond*, 935 F.2d 1511 (7th Cir. 1991).

Warner has a more colorable argument on this score. He notes that Ryan is the sole Defendant named in nine of the 22 counts of the indictment. Two of the nine (Counts Six and Ten) are mail fraud counts involving state contracts of a nature similar to those in which Warner was allegedly involved. Although Warner had no alleged involvement in either of these contract awards, the court concludes that they are similar enough to matters in which he was allegedly involved that joinder is proper here, and that any prejudice to Warner can be addressed by way of an appropriate instruction to the jury.

The remaining seven assertedly misjoined counts are charges of false statements and tax claims. The alleged conduct was that of Ryan alone. The government notes that several Seventh Circuit cases have upheld the joinder of tax evasion charges against one defendant with RICO charges against others. *See, e.g., United States v. Anderson*, 809 F.2d 1281, 1288 (7th Cir. 1987). There might well be no abuse of discretion in denying joinder in these circumstances, particularly if the evidence on these seven counts is relatively brief. If it is not, the court

believes prejudice to Warner could be eliminated if the government were directed to present evidence on these charges only after evidence on all other counts has been presented to the jury. Alternatively, the court will consider bifurcating the evidence on these counts from the remainder of the indictment, with these counts to be tried to the same jury only after they have returned a verdict on the counts that relate to Warner and Ryan jointly, and to the South Holland lease and Grayville prison counts (Counts Six and Ten).

Such a procedure would address Warner's *Bruton* concerns, to the extent they are valid. In *Bruton v. United States*, 391 U.S. 123 (1968), the Court recognized that when a defendant will be faced with a co-defendant's accusatory statements, the non-declarant is entitled to a severance. As Warner himself recognizes, for *Bruton* to apply, the co-defendant's statements "not only must be powerfully incriminating, but also facially incriminating of the non-declarant defendant." (Warner's Memorandum of Law in Support of Motion for Severance, at 10) (citing *Richardson v. Marsh*, 481 U.S. 200, 207-08 (1987)). As this court understands them, none of Ryan's statements at issue in this case are incriminating: Specifically, Ryan allegedly stated that he appointed Warner to the McPier board on a resigning board member's recommendation; that he never discussed the Joliet lease or SOS Office leases with Warner and had no personal knowledge that Warner profited from the Joliet lease; that he had no idea of the source of Warner's information concerning those leases; and that he had no personal financial relationship with Warner. Simply put, nothing about any of these

statements suggests improper conduct on Warner's part.

Finally, Warner asks the court for severance under Rule 14, which permits the court to order severance to prevent prejudice. In support of this request, Warner asks the court "not to slight reality," but instead to be sensitive to the enormous negative publicity Ryan has endured, not only as a result of the "Licenses for Bribes" investigation, but also because of Ryan's controversial decision, the last days of his tenure as Governor, to commute the death sentences of every Illinois inmate on death row. (Warner's Memorandum of Law in Support of Motion for Severance, at 15.) The court is indeed sensitive to these matters and understands the difficulty that the court and the parties will face in jury selection and in the day-to-day trial process. Realistically, however, severing Warner's trial from that of Ryan will not eliminate these difficulties.[49] A trial of Warner by himself will necessarily implicate Ryan in a variety of ways and will generate extensive press attention even if Ryan is not a party.

D. Warner's Motion to Dismiss for Speedy Trial Act Violation

Defendant Warner seeks dismissal of the charges against him based on violation of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* He argues that the Speedy Trial Act "clock" should tick during periods of

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[49] As the parties are well aware, this court conducted the trial of Ryan's associate, Scott Fawell, months ago. Ryan himself was not a party to that trial, but every potential juror was questioned about his or her views concerning Ryan and whether he/she could put positive or negative views aside in making a decision based on the evidence.

time for preparation of pretrial motions under § 3161(h)(1)(F). Warner acknowledges that the Seventh Circuit has ruled against his position on this issue, however, and the court concludes that the government's calculations of the days that have elapsed are accurate. As noted earlier, the court remains concerned by the delay that the joinder of Ryan has caused for Warner. Although Warner is not in custody, his personal and professional life are certainly in turmoil as a result of these pending charges. Further, although the court does not recognize a qualitative difference between the delay in this case and the delay in others cited by the government, the number of months between his original indictment and the scheduled trial is large. The court therefore remains willing to try this case at the parties' earliest possible convenience and stands ready to alter its trial schedule and begin at the very first day that Ryan's attorneys are ready.

The motion for dismissal on Speedy Trial grounds is denied.

E. Defendants' Motions to Strike

Both Ryan and Warner have moved to strike language from the second superseding indictment. Rule 7(d) authorizes the court to strike from an indictment allegations that are "immaterial, irrelevant or prejudicial." As the government points out in response, the case law reflects that such motions are not often granted. *See United States v. Stoecker*, 920 F. Supp. 867, 887 (N.D. Ill. 1996) (motion to strike should be granted only if the allegations are "'clearly not relevant to the charge and are inflammatory and prejudicial") (citations omitted); *United States v. Marshall*, 985 F.2d 901,

905-06 (7th Cir. 1993) (declining to grant such a motion and observing that the "language of the indictment can hardly be characterized as immaterial since it delineates with great specificity the numerous charges alleged by the government against each defendant"). In *United States v. Lavin*, 504 F. Supp. 1356 (N.D. Ill. 1981), Judge Moran observed that "language in the indictment which covers information which the government, in good faith, intends to prove at trial cannot be stricken as surplusage, no matter how prejudicial it may be." *Id.* at 1362. The court granted the motion to strike in *Lavin*, where defendant property tax commissioners were charged with taking bribes in return for reductions in property assessments. Specifically, the court struck an allegation "that property assessments were corruptly reduced in over two thousand cases" where it was clear that the government intended to offer evidence concerning far fewer incidents of bribery. *Id.*

The court does not understand Warner and Ryan to be arguing that the government does not intend to prove the allegations that Defendants seek to have stricken. To the extent they are making such an argument, the court adopts the government's suggestion that their motions to strike should be entered and continued until the evidence has been presented at trial. (Gov't Resp., at 46-47.)

Defendants do contend that some of the allegations are irrelevant to the charges against them and prejudicial. Although relevance and prejudice are often most readily addressed in the context of trial, the court is prepared to address at least some of the matters that are targets of these motions at this point.

1. 18 U.S.C. § 1512

First, with respect to 18 U.S.C. § 1512, Defendant Ryan is correct that the second superseding indictment makes no direct reference to witness tampering; but as the government notes, § 1512 prohibits not only witness tampering, but also alteration or destruction of records or documents so as to render them unavailable in an official proceeding. 18 U.S.C. § 1512(c). The indictment alleges that, in Defendant Ryan's presence, after learning about a grand jury investigation of campaign activities in the Secretary of State's office, Ryan's subordinate Scott Fawell directed an SOS employee to "clean up" documents relating to Citizens For Ryan. If the government fails to offer evidence of a violation of § 1512, the court will strike that reference.

2. Preamble

Both Defendants object to the 11-page preamble to the indictment as "irrelevant and prejudicial monologue." They cite *United States v. Vastola*, 670 F. Supp. 1244, 1255 (D.N.J. 1987), where the court granted a motion to strike a preamble that contained an irrelevant narrative and potentially suggested that certain defendants not charged with RICO violations were in fact guilty of such violations. During the course of the trial, this court will entertain proposed revisions to the preamble to the extent that information set forth therein is irrelevant and prejudicial. The court notes, however, that at least some of the state statutes and regulations cited there are indeed relevant and necessary to explain conduct alleged in specific counts. For example, the jury may well need some explanation of the reasons

that Warner allegedly kept his name off certain lobbying agreements. Further, without some information concerning Illinois statutes banning public officials from accepting gifts from persons doing business with the state, the jury is unlikely to understand the reasons Ryan allegedly engaged in sham transactions to conceal his acceptance of free lodging from a business associate. If the evidence at trial demonstrates that any of the statutes cited is irrelevant to the charges, the court will grant Defendants' motion to strike the reference.

3. References to Third Parties

Defendants object to such expressions as "others known and unknown," "nominee" and "conduit." With respect to "others," the government asserts that listing every person involved in each event alleged in the indictment would be cumbersome and overly detailed, but that it "has every intention of presenting evidence at trial of the known people who are referenced" in the indictment as "others." (Gov't Resp., at 51.) On the strength of that representation, the motion to strike this expression is denied without prejudice. The court also overrules Warner's objection to the terms "conduit" and "nominee." Warner contends these terms are argumentative and prejudicial, but in the court's view they convey more information than Warner's preferred substitute expression, "third party." If the evidence at trial does not establish that the individuals at issue acted as conduits or nominees for the receipt or exchange of funds, the court will direct appropriate amendments to the indictment.

4. Events that are not the Subject of Specific Mailings

Both Defendants object to references in Count Two to circumstances they claim are unrelated to the mail fraud charges in Counts Two through Ten. The episodes described in Count Two include the award of a title laminates contract to ADM; award of a consulting contract to ATC; the solicitation of Modern Business Systems regarding a photocopier lease; leases on property in Springfield owned by clients of Associate 1; the hiring of Associate 1 as a lobbyist for MPEA; the Wisconsin Energy lobbying referral; Warner's and Ryan's involvement in distribution of low-digit license plates; interference with activities of the Illinois Inspector General; and the shredding of campaign documents. The government insists each of these episodes is a part of the charged scheme to defraud the people and State of Illinois of money, property, and the intangible right to the honest services of Defendant Ryan and other state officials. The government cites *United States v. Lanas*, 324 F.3d 894 (7th Cir. 2003), where a claims adjuster for Alexsis Risk Management assigned surveillance work to six vendors who paid cash kickbacks to him for each job. At the trial on a three-count indictment, the government offered evidence not only of the three charged mailings of money to defendant Lanas and another vendor, but also of several other vendors who paid kickbacks. Defendants argued on appeal that this evidence was at variance with the allegations of the indictment, but the Seventh Circuit rejected their contention that "the scope of a mail fraud scheme is limited by the mailings that are specifically charged in the indictment." *Id.* at 901. The indictment alleged one overarching fraud scheme, in the court's view,

and evidence concerning other vendors who paid kickbacks constituted additional proof of that scheme.

The connection between at least some of the episodes alleged in Count Two is arguably a looser one than the evidence presented in the *Lanas* case, where the claims adjuster's manner and method of cheating his employer followed a consistent pattern. The court nevertheless has little difficulty concluding that at least those episodes relating to the solicitation and award of contracts and leases and to lobbying agreements are part of the charged scheme to defraud. Matters involving the distribution of low-digit license plates, the dismantling of the Illinois Inspector General's office, and the shredding of campaign documents are of a slightly different nature, but these matters, too, constitute misuse of state resources for personal or political ends. The motion to strike these allegations is denied without prejudice.

5. Paragraphs 11, 52, and 130 of Count Two

Finally, Warner objects to certain paragraphs of Count Two as irrelevant and prejudicial. First, he correctly notes that paragraph 11 of Count Two of the indictment identifies personal and financial benefits Warner supplied to Ryan, but does not allege that the benefits were extended in exchange for official action. The court agrees that extending favors to a governmental official is not necessarily unlawful and that the jury must find a connection between the benefits that Ryan and Warner extended to one another in order to find that the two conspired to deprive the State of Illinois of Ryan's honest services. In the court's view, this is a matter that can be

addressed in jury instructions, not by way of striking paragraph 11.

In paragraph 52 of Count Two, the indictment details Warner's purchase of Viisage stock months before the SOS Office awarded a contract to Viisage. The government argues that this evidence will "help the jury understand the circumstances under which Warner operated to enrich himself" with non-public information. (Gov't Resp., at 55.) Warner's purchase of the stock presumably reflects his confidence that the contract would ultimately be awarded to Viisage and may be admissible on that basis. The court shares Warner's concern that the jury not be invited to consider this matter as evidence of some other uncharged wrongdoing, however, and will consider striking this allegation from the indictment or giving an appropriate instruction concerning the matter.

Paragraph 130 refers to "a driver involved in a widely-publicized fatal traffic accident." Warner notes this allegation is unrelated to his own wrongdoing and that evidence of the incident is unfairly prejudicial. The court agrees with the government's characterization of this language as "muted and hardly inflammatory," (*Id.* at 56), as it makes no mention of the number of victims, their age, or other tragic circumstances. The court also agrees that the government has included a reference to this incident as evidence of an act in furtherance of the mail fraud with which Warner is charged. The motion to strike paragraph 130 is denied.

F. Defendants' Motions for a Bill of Particulars

Both Defendants have moved for a bill of particulars, arguing that without additional information, they are unable to prepare their defense.

The government brushes off this concern, insisting that the 91-page indictment is adequate notice of the charges against Defendants, and noting its willingness to provide substantial disclosure well in advance of the scheduled trial date.

Rule 7(f) authorizes the court to order the government to produce a bill of particulars if the allegations of the indictment are inadequate to provide notice of the charges against a defendant. Under Rule 7(f), a court may order a bill of particulars if the indictment fails to provide sufficient notice of the charges to allow the defendant to prepare for trial. *United States v. Fassnacht*, 332 F.3d 440, 446 (7th Cir. 2003) (citing *United States v. Kendall*, 665 F.2d 126, 134 (7th Cir. 1981)). Thus, the test for determining whether a motion for a bill of particulars should be granted is "whether the indictment sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges to enable him to prepare for trial." *Fassnacht*, 332 F.3d at 446. Another court has explained that in determining whether to impose the requirement of a bill of particulars, the court may consider "the complexity of the charges, the clarity of the indictment, and the degree of discovery available to the defense . . . ." *United States v. Vasquez-Ruiz*, 136 F. Supp. 2d 941, 942 (N.D. III. 2001). A defendant is only entitled to be informed of the charges against him; he is not entitled to know the details of how the government will go about proving its case. *Kendall*, 665 F.2d at 134; *see also United States v. Glecier*, 923 F.2d 496, 502 (7th Cir. 1991). Further, as the *Fassnacht* court noted, a bill of particulars is not required where the defendant is able to obtain information necessary for his defense

through other means, for exa[illegible]le, pre-trial disclosure by the government of relevant documents. 332 F.3d at 447 n. 2.

In this case, Defendants urge that the length and breadth of the indictment militate in favor of a bill of particulars; the government argues that the charging document does identify the specific incidents on which it will rely to prove the charges. The government notes, further, that it will make or has made a substantial disclosure of relevant documents, either voluntarily or pursuant to this court's order. The court recognizes that this voluminous production of documents by itself does not preclude an order requiring more specifics. *Cf. Vasquez-Ruiz*, 136 F. Supp. 2d at 943 ("[t]he defense should not be left to its own devices and a sifting of the voluminous materials that have been provided in order to divine the particulars of these critical allegations"). For the reasons set forth here, the motions are granted in part and denied in part.

Defendant Warner asks that the government be ordered to provide the "date, place and participant in each agreement or act involved in the alleged 'pattern of racketeering activity.'" (Warner Memorandum in Support of Motion for Bill of Particulars, at 3.) The indictment includes those details with respect to several substantive counts of mail fraud (Counts Two through Ten); extortion (Count Fourteen); money laundering (Counts Fifteen and Sixteen); and structuring currency transactions (Count Seventeen). The court understands those counts to constitute as well the acts involved in the pattern of racketeering activity; if the government expects to present evidence of other specific acts of racketeering, and to ask the jury to make findings on such acts, the

government will be required to furnish a bill of particulars on those matters. Similarly, Defendant Warner asks the government to identify the "other officials" and "employees of the State of Illinois" identified in Count 2 ¶ 3. The court understands these as references to Illinois officials who played a role in decisions concerning leases and contracts in which Warner was involved, but in the context of this indictment, the court does not believe specific identification of each such individual is necessary in order for Warner to prepare his defense. Finally, Warner asserts that he is entitled to a description of "each materially false and fraudulent pretense[ ], representation[ ], promise[ ], and material omission." (Warner Memorandum in Support of Motion for Bill of Particulars, at 3.) The court will generally not require such disclosure, which would in effect constitute the "details of how [the government] plans to prove its case." *Glecier*, 923 F.2d at 502. The court does, however, direct the government to provide detail that supports its allegation that Warner "fixed false and misleading lobbyist registration statements relating to IBM and failed to disclose all of his Ryan-related expenditures." (SSI, Count 2 ¶ 46.)

Defendant Ryan has identified a list of 23 items of information he claims to need in order to prepare his defense. With respect to certain of those items, the court believes his request goes beyond a request to be informed of the charges against him. The court will not require the government to identify specific benefits received by Ryan in exchange for certain acts, or with knowledge that they were provided to influence him (Ryan's Motion for Bill of Particulars, at 8, Particulars Regarding Payments, Benefits, or Income, Items 1-3), though Ryan will be free to argue

that benefits received by him were not quid pro quos for official acts. In this court's view, the indictment does apprise Ryan of the benefits that Warner allegedly provided to Ryan or Citizens For Ryan; of the SOS Office resources that Ryan allegedly diverted; and of the benefits Citizens For Ryan received. (*Id.* Items 7, 9, and 10.) The court concludes the indictment adequately identifies the allegedly false and misleading statements and "sham" transactions alleged in Counts Two, Eleven, Twelve, Thirteen, and Eighteen, and that the government is not required to restate the questions asked by law enforcement agents that elicited these statements. (*Id.* Particulars Regarding Fraud/Misstatements, Items 4-6.) The court assumes the statements alleged in those counts are also the bases for the government's assertion that Ryan attempted to obstruct the investigation and that he concealed and hid the acts of the conspiracy, and will order no further particulars concerning those matters. (*Id.* Items 7, 8.)

The court believes the indictment already provides information sufficient to identify the individuals or entities referred to; for example, Ryan Relative One is identified as "the husband of a Ryan Daughter"; Individual 2 as "a caretaker for defendant Ryan's mother-in-law"; Associate Z as an individual who annually furnished Ryan with the use of his vacation home in Jamaica. (SSI, Count 18 ¶¶ 2A, B; Count 2 ¶ 89.) The court will require no further disclosure of this information absent a showing that Ryan in good faith cannot determine who such individuals are. (Ryan's Motion for Bill of Particulars, Particulars Regarding Persons, Items 1, 2.) Finally, Ryan asks for particulars concerning when he "approved a plan"

by Warner to share proceeds of payments with Udstuen. (*Id.*, Particulars Regarding Dates, Item 1.) The indictment alleges that in early 1991, Warner told Udstuen that Ryan had approved such a plan. It alleges, further, that payments were made to Udstuen with Ryan's approval, but does not allege that this actually occurred pursuant to a plan, nor does it suggest that Ryan formerly approved a plan at a particular time; the court will require no further particulars concerning this matter.

With respect to certain other items, the court will require some additional disclosure: In Count Eighteen ¶ 6, the indictment alleges that Ryan wrote and caused the writing of "false and misleading notations on [Citizens For Ryan] checks issued to family members," but does not identify which checks bear such allegedly false notations. (Ryan's Motion for Bill of Particulars, at 5.) Ryan asserts that Citizens For Ryan issued thousands of checks per year; the court will direct the government to provide at least several examples of checks on which it contends false notations appear, or a method by which Ryan can easily identify those checks. (*Id.*, Particulars Regarding Fraud/Misstatements, Item 1.) Similarly, the court will direct the government to identify low-digit license plates that Ryan awarded, or a method by which Ryan can determine this information from the documents that have been produced. (*Id.*, Particulars Regarding Payment, Benefits, or Income, Item 8.) The court will also require the government to identify the payments from the Gramm campaign to individuals that Ryan, Fawell and Juliano designated, or a method by which Ryan can identify those payments. (*Id.*, Particulars Regarding Payments, Benefits of Income, Items 11,

12.) In addition, Ryan notes that the government has not identified the line items within his tax returns that are alleged to be false or what income he is alleged to have failed to disclose. For each of the years in which allegedly false tax returns were filed, the government is directed to identify in a general way what income Ryan improperly failed to report. (*Id.*, Particulars Regarding Fraud/Misstatements, Items 2,3; Particulars Regarding Payments, Benefits, or Income, Items 5, 6.)

G. Ryan's Motion for Immediate Disclosure of Favorable Evidence

Ryan has moved for an order requiring disclosure of all evidence favorable to him and within the government's custody. The government has acknowledged its ongoing obligations under *Brady* and other authorities to provide such material as soon as it is identified. The court therefore grants this motion without objection.

H. Ryan's Motion for Timely Disclosure of Impeachment Evidence

Defendant Ryan asks for disclosure, no later than 120 days before trial, of any impeachment evidence the government may have concerning the witnesses it intends to call at trial. The government has acknowledged its obligation to produce such evidence under *Giglio v. United States*, 405 U.S. 150 (1972), and expects to do so 60 days in advance of the trial. Ryan argues this is inadequate, and points out that the government has announced its intention to begin trial preparation in August 2004.

At the risk of being accused of arbitrarily splitting the difference, the court concludes that a 90-day disclosure period is most appropriate. In opting for an

earlier date than proposed by the government, the court is mindful of the fact that there will be dozens of witnesses called in the trial of this case. In declining to set the date as early as 120 days before the scheduled trial, the court observes that it is Ryan's own attorneys who insisted on a trial date in March. Ryan's counsel is unavailable in September, this court's preferred date for trial, due to a longstanding prior commitment that, he asserts, will keep him fully occupied until the end of the year. Even recognizing that other lawyers in his firm could presumably begin the process of preparing cross-examination prior to that date, the court believes a disclosure date 90 days prior to trial is adequate for Mr. Ryan to prepare his defense.

I. Ryan's Motion for an Order Requiring Immediate Notice of 404(b) Evidence

Defendant Ryan has asked that the court order the government to give notice of its intent to offer Rule 404(b) evidence immediately. In its consolidated response to the pre-trial motions, the government has offered to produce such material 60 days before trial. Ryan has accepted that proposal, and it is hereby so ordered.

J. Ryan's Motion for Pretrial Production of *Jencks* Material and Witness List

Pursuant to 18 U.S.C. § 3500, *Jencks* material must ordinarily be produced at trial. In complex cases such as this one, however, involving dozens of witnesses and many thousands of documents, courts encourage production of such materials well in advance of the trial. The government has offered to produce this material 60 days before trial; Ryan again urges that a production date 120 days in

advance is more appropriate. For the reasons stated with respect to the motion for disclosure of impeachment evidence, the court will require disclosure of *Jencks* material 90 days prior to the scheduled trial date.

Ryan also asks the court to order production of a witness list 45 days prior to trial. He argues that relevant factors weigh in favor of this disclosure, including the very large number of witnesses, the complexity of the facts at issue, the absence of any risk that witnesses would be intimidated by the defense, and the fact that the government would not be prejudiced by this disclosure. The government objects, citing settled case law holding that the prosecution is not required to reveal the names of its witnesses prior to trial. United *States v. Braxton*, 877 F.2d 556, 560 (7th Cir. 1989); *United States v. Napue*, 834 F.2d 1311, 1317 (7th Cir. 1987); *United States v. Bouye*, 688 F.2d 471, 473-74 (7th Cir. 1982). Instead, the government proposes to proceed as it did in the case of *United States v. Fawell*, No. 02 CR 310, i.e., by furnishing the court with a list of names likely to come up at trial, for use in jury selection, and then providing a list of the witnesses it intends to call "on a rolling basis as trial progressed." (Gov't Resp., at 67.)

The court agrees with the government that the procedure adhered to in the *Fawell* prosecution will satisfy due process concerns. First, as a practical matter, it seems likely that all parties will be well aware of the identity of substantially all of the key witnesses well before trial begins, based upon the language of the indictment and the disclosure of impeachment evidence a full 90 days before trial. Also, as a matter of practicality, it will be hard to

predict the precise availability of particular witnesses and/or the order in which they can or should be called to testify. The court will expect each side to provide appropriate advance notice of the order in which they expect to call witnesses and believes 48 hours is the minimum amount of advance notice that would be appropriate. Should a more specific direction on this matter be required as the case proceeds, the court will entertain further argument on the matter.

K. Ryan's Motion for Immediate Production of Statements

The government recognizes its obligation to produce all statements made by Defendant Ryan and represents that it has already done so. In response, Ryan has withdrawn this motion.

L. Ryan's Motion for an Order Concerning Electronic Surveillance Evidence

Ryan asks that the government affirm or deny the occurrence and legality of any electronic or video surveillance conducted as part of the government's investigation of this case, as required by 18 U.S.C. § 3504. The government has furnished an affidavit from AUSA Patrick M. Collins, stating that government agents are unaware of any electronic surveillance of Defendant Ryan, with the exception of a single recorded telephone conversation in April 2002. The tape recording, and a draft transcript, has been produced, and Ryan accordingly has withdrawn this motion.

M. Ryan's Motion for an Order Directing the Government to Produce Agents' Notes

Ryan asks the court to require the prosecution to produce all of the original handwritten notes of law

enforcement agents who interviewed him. Rule 16(a)(1)(A) requires the government to disclose the substance of any oral statement made by a defendant to a government agent if the government expects to use the statement at trial. In this case there can be no doubt that the government expects to use certain statements made by Ryan, as it has charged in three counts that certain of those statements were false.

As the government notes, the Seventh Circuit has held that the government satisfies the requirements of Rule 16 without furnishing original handwritten notes, so long as it does produce a written report containing all of the information in those notes. *See United States v. Coe*, 220 F.3d 573, 582 (7th Cir. 2000); *United States v. Muhammad*, 120 F.3d 688, 699 (7th Cir. 1997). With respect to any government witness who testifies to what Ryan told him, production of such a report satisfies the government's obligations under the *Jencks* Act as well. *United States v. Bastanipour*, 697 F.2d 170 (7th Cir. 1982). To demonstrate its compliance with the requirement that the written reports it has produced are accurate and complete, the government has offered to produce the agents' notes for the court's *in camera* review. The court adopts this proposal and directs the government to produce agents' handwritten notes, together with the written reports purportedly summarizing those notes. Should the court detect even slight omissions or alterations, it will entertain Ryan's request for production of the original notes.

N. Ryan's Motion for an Order Requiring the Government to Make a *Santiago* Proffer

The government does not object to Ryan's request for a *Santiago* proffer, but the parties again part

company on the scheduling of such a disclosure. As before, the court directs a disclosure earlier than the government proposes, but later than Ryan would prefer, i.e., 90 days before trial.

O. Warner's Motion to Adopt Pretrial Motions Filed by Ryan

The government does not object to this motion, and it is granted.

P. Warner's Motion to Reassert Prior Motions

In the months since the original indictment in this case, Ryan has filed several motions; he asks to reassert those motions in response to the superseding indictment. The government has no objection to this motion, but asks the court to consider its previously-filed responses to those motions, as well. Warner's motion is granted, as is the government's request to renew its previous responses.

Q. Government's Motion for Reciprocal Discovery

Citing FED. R. CRIM. P. 16(b)(1)(A), the government asks the court to enter an order requiring Defendants to make various documents available for inspection. Neither Defendant has objected to the request and the motion is granted.

CONCLUSION

For the reasons stated above, Defendants' motions are granted in part and denied in part. Defendants' motions to dismiss the RICO conspiracy charge (Docket No. 142-1, 160-1) and their motions to sever certain counts from the indictment and/or to sever both co-defendants from each other (Docket No. 138-1, 150-1) are all denied. Ryan's motion to dismiss the

mail fraud charges against him (Docket No. 167-1) is denied. Warner's related motion to dismiss all charges on Speedy Trial grounds (Docket No. 140-1) is also denied. Defendants' motions to strike certain language and allegations from the indictment (Docket No. 84-1, 144-1, 159-1) are denied without prejudice. Defendants' motions for a bill of particulars (Docket No. 146-1, 166-1) are granted in part and denied in part as stated in this opinion.

Ryan's motion for immediate disclosure of favorable evidence (Docket No. 158-1) is granted without objection. Ryan's motions for timely disclosure of impeachment evidence (Docket No. 157-1), motion for pretrial production of *Jencks* material and a witness list (Docket No. 156-1, 156-2), and motion for an order requiring the government to make a *Santiago* proffer (Docket No. 58-1, 155-1) are granted in part and denied in part. Specifically, the government must disclose impeachment evidence, produce *Jencks* material, and make a *Santiago* proffer 90 days before trial, and must produce a witness list in accordance with the procedures set forth in this opinion. The parties have agreed that the government will give notice of its intent to offer Rule 404(b) evidence 60 days before trial, and Ryan's motion for such disclosure (Docket No. 154-1) is granted. Ryan has withdrawn his motion for immediate production of statements made by him (Docket No. 153-1) and his motion for an order requiring the government to affirm or deny the occurrence and legality of any electronic or video surveillance and to produce same (Docket No. 152-1). Both are denied as moot. With respect to the original handwritten notes of law enforcement agents who interviewed Ryan, the government is ordered to

produce them, together with the relevant typewritten reports, to the court for *in camera* review by August 20, 2004. Ryan's motion for production of the notes (Docket No. 151-1) is denied without prejudice pending that review.

Warner's motion to adopt the pretrial motions filed by Ryan (Docket No. 149-1) and his motion to reassert motions filed prior to the return of the second superseding indictment (Docket No. 148-1) are both granted. The government's corresponding request to renew its previous responses to Warner's prior motions is also granted. Finally, the government's request for reciprocal discovery (Docket No. 171-1) is granted.

ENTER:

Dated: August 11, 2004

/s/
REBECCA R. PALLMEYER
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA	)
	)
	)
v.	) **Case Number:**
	) **02-CR-506-4**
George H. Ryan, Sr.	) **Judge:**
	) **Rebecca R. Pallmeyer**

Dan K. Webb, Defendant's Attorney
Joel R. Levin, AUSA

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

THERE WAS A:

jury verdict of guilty as to count(s) 1, 2-5, 6, 7-8, 11-13, 18, 19-22 of the Second Superseding Indictment.

THERE WAS A:

judgment of acquittal as to count(s) 9, 10 of the Second Superseding Indictment. The defendant is acquitted and discharged as to these counts.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §1962(d)	Racketeering	11/15/2002	1
18 U.S.C. §1341	Mail Fraud	11/15/2002	2-8
18 U.S.C. §1001(a)(2)	Making Materially Fraudulent Statements & Representations	11/15/2002	11-13
18 U.S.C. §7212	Obstruct/ Impede Administration of Internal Revenue Service	11/15/02	18
26 U.S.C. § 7206(1)	Filing False Income Tax Returns	11/15/02	19-22

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **78 Months on Count 1.**

As to Count 2 - 8 & 11 - 13, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **60 months**. As to Count 18 - 22, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **36 months, all to run concurrent**.

The Court recommends to the Bureau of Prisons:

Placement at Oxford facility.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction to Supervised Release, said periods to run concurrent as follows:

Counts	1-8, 11-13, 18-22	a period of	1 year(s) Supervised Release

The defendant shall report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of supervised release that apply in this case.

Based on the defendant's inability to pay, the costs of incarceration are waived.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE
(As set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court;

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 358.30);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons:

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment, restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution

and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	Mandatory Costs of Prosecution
$1,600	**Fine Waived**	**$603,348**	**$19,000**

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

Restitution is ordered in the amount of $603,348.00

The interest requirement on restitution is waived.

Restitution to be paid as listed below.

Name of victim entitled to restitution (mailing address noted for public entitles only)	Restitution Ordered	Priority
Ms. Donna M. Leonard, Executive Counsel Illinois Secretary of State's Office, 17 North State Street Chicago, Illinois 60602	$603,348	100%

If the defendant makes a partial payment, each payee shall receive an approximately proportional

payment unless specified otherwise in the priority payment column above. Pursuant to 18 U.S.C. § 3664(1), all non-federal victims shall be paid in full prior to the United States receiving payment. Pursuant to 18 U.S.C. § 3664(j), if a victim has received compensation from insurance or any other source with respect to a loss, restitution shall be paid to the person who provided or is obligated to provide the compensation. All restitution to victims required by the order shall be paid to the victims before any restitution is paid to such a provider of compensation.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

• Pursuant to 18 U.S.C. § 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:

In installments:

Monthly installments of 10% of net monthly income over a period of 24 months, to commence fifteen days after the date of this judgment.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during, a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

FORFEITURE

Forfeiture is ordered as provided in the attached preliminary order of forfeiture.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: **before 2:00 P.M. on January 4, 2007.**

Date of Imposition of Judgment/Sentencing: September 6, 2006

/s/
REBECCA R. PALLMEYER
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this 6th day of September, 2006

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA	)
	)
	)
v.	) **Case Number: 02-CR-**
	) **506-1.**
	) **Judge: Rebecca R.**
	) **Pallmeyer**
Lawrence E. Warner	)

Edward M. Genson, Defendant's Attorney
Joel R. Levin, AUSA

JUDGMENT IN A CRIMINAL CASE.
(For Offenses Committed On or After November 1, 1987)

THERE WAS A:

jury verdict of guilty as to count(s) 1 ss, 2ss-5ss, 7ss-8ss, 14ss, 15ss-16ss, 17ss of the Second Superseding Indictment.

THERE WAS A:

judgment of acquittal as to count(s) 9ss of the Second Superseding Indictment. The defendant is acquitted and discharged as to this count.

Count(s) 1-2, 1s-2s, 3, 3s, 4, 4s, 5, 5s, 6, 6s, 7, 7s, 8-10, 8s-10s, 9ss are dismissed on the motion of the United States.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §1962(d)	Racketeering	11/15/2002	1ss
18 U.S.C. §1341	Mail Fraud	11/25/2002	2ss - 5ss
18 U. S.C. §1346	Interstate Carrier Fraud	11/15/2002	7ss - 8ss
18 U.S.C. §1951	Extortion	11/15/2002	14ss
18 U.S.C. §1956(a)(1)(B)(1)	Money Laundering	11/15/2002	15ss & 16ss
31 U.S.C. §5324(a)(3) and (d)(2)	Structuring Transactions To Evade Reporting Requirement	11/15/2002	17ss

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **41 Months**.

As to Count 1ss, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **41 Months**. As to Count 2ss - 5ss, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **41 Months**. As to Count 7ss - 8ss, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **41 Months**. As to Count 14ss, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **41 Months**. As to Count 15ss – 16ss, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **41 Months**. As to Count 17ss, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **41 Months, all to run concurrently**.

The Court recommends to the Bureau of Prisons:

Recommend Yankton, S.D. Defendant to participate in residential drug and alcohol treatment program.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction to Supervised Release, said periods to run concurrent as follows:

Counts	1ss, 2ss-5ss, 7ss-8ss, 14ss, 15ss-16ss, 17ss	a period of	1 year(s) Supervised Release.

The defendant shall report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of supervised release that apply in this case.

Based on the defendant's inability to pay, the costs of incarceration are waived.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE
(As set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court;

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment, restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

DISCRETIONARY CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall complete 100 hours of community service, as approved by the probation officer.

Defendant to pay costs of Supervised Release.

Defendant shall participate in an alcohol aftercare treatment program which may include urine testing at the direction of the probation officer.

The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised. The defendant shall pay financial penalties according to a monthly installment payment schedule. The monthly payments shall be in an amount equal to ten percent (10%) of the defendant's gross monthly income.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	**Mandatory Costs of Prosecution**
$1,100	**$75,000**	**$431,348**	**S**

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

Restitution is ordered in the amount of $431,348

Restitution to be paid as listed below.

Name of victim entitled to restitution (mailing address noted for public entitles only)	**Restitution Ordered**	**Priority**
Ms. Donna M. Leonard Executive Counsel Illinois Secretary of State's Office	$431,348	100%

17 North State Street, Suite 1179 Chicago, Illinois 60602		

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority payment column above. Pursuant to 18 U.S.C. § 3664(1), all non-federal victims shall be paid in full prior to the United States receiving payment. Pursuant to 18 U.S.C. § 3664(j), if a victim has received compensation from insurance or any other source with respect to a loss, restitution shall be paid to the person who provided or is obligated to provide the compensation. All restitution to victims required by the order shall be paid to the victims before any restitution is paid to such a provider of compensation.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the

fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

• Pursuant to 18 U.S.C. §§ 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:

In full:

Due immediately.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

FORFEITURE

Forfeiture is ordered as provided in the attached preliminary order of forfeiture.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: **before 2:00 P.M. on January 16, 2007.**

Date of Imposition of Judgment/Sentencing: September 6, 2006

/s/
REBECCA R. PALLMEYER
UNITED STATES DISTRICT JUDGE
Dated at Chicago, Illinois this 6th day of September, 2006

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(4)

No. 07-977

FILED
MAY 6 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

LAWRENCE E. WARNER AND GEORGE H. RYAN,
PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Brief in Opposition ("Opp.") demonstrates the compelling need for this Court to review the important questions presented arising out of the conviction of a State's governor for conduct relating to his official duties. Indeed, the opposition reveals the recurring confusion over the standards governing the removal and substitution of deliberating jurors and illustrates the significance of all three jury-related questions in light of the bedrock constitutional guarantees to a fair trial before an impartial and unanimous jury. It advocates views that are not only subject to express conflicts but that have enormous practical import for criminal trials throughout the Nation.

On the first question presented relating to the removal and substitution of jurors during deliberations, respondent concedes the circuit split on the standard governing the removal of a holdout juror. Respondent argues that the conflict is not implicated here because there was a legitimate basis for removal. But in taking that position, respondent has simply chosen one side over another in the recurring debate over the proper standard for removal. The question presented is whether a deliberating juror can properly be removed when there is an objective possibility that removal is sought based on the juror's view of the evidence, *or* — as respondent argues — is removal proper so long as there is any basis in the record? On substitution, respondent eschews a discussion of constitutional limitations, and the conflicting positions taken by the government in this very case demonstrate the confusion over the question.

With regard to the second question — the structural error stemming from the jurors' fears of prose-

cution — respondent seeks to avoid the merits by mistakenly claiming waiver on a question that petitioners have raised at every level of the court system. And that claim itself implicates the ongoing debate over whether a structural error can even be waived. On the substance, respondent fares no better because its opposition is predicated on speculative claims about a supposed absence of actual prejudice where the difficulty in assessing prejudice is itself a distinguishing trait of structural error.

On the third question, respondent, like the court below, defends a toothless standard of review by claiming that petitioners "abandoned" cumulative error. That claim, while mistaken, squarely implicates the split in authority discussed in the Petition: whether a reviewing court has an *independent* obligation to evaluate the cumulative effect of errors raised on appeal. And respondent's fallback position implicates another circuit split, namely, whether the finding of a single error precludes a cumulative error analysis.

In short, respondent's opposition casts no doubt on the need for this Court's review.

A. The Question Concerning The Constitutional Limits On The District Court's Power To Remove and Substitute Deliberating Jurors Is Squarely Presented, Is Subject To Conflicts In Authority, And Is Recurring And Important

The brief in opposition is noteworthy for what it does not address. From the opposition, a reader could not discern that the Seventh Circuit expressly held below that an inquiry into the prejudice to a defendant's constitutional rights to a fair trial before an

impartial jury stemming from a decision to remove and substitute deliberating jurors is required *only* when "a district court fails to comply with the non-discretionary requirements of [Rule 24]." App. 35a. Nor does the opposition acknowledge the Seventh Circuit's holding that "[t]he defendants have the burden of demonstrating on appeal that there was no legitimate basis in the record" for the decision to remove and substitute. App. 35a-36a.

Respondent's reluctance to address these points is obvious. The framework adopted by the court below, in which literal compliance with Rule 24 eliminates any constitutional objection to the decision to remove and substitute deliberating jurors, is incompatible with the constitutional guarantees to an impartial jury, unanimous verdict and fair trial. See U.S. Const. amends. V, VI. Respondent offers summary assurances that "[t]here was nothing wrong" or "improper," Opp. 9-10, but never addresses whether there are any constitutional limits in the wake of the 1999 amendment to Rule 24. The petition squarely presents that as an issue warranting this Court's review.[1]

The brief in opposition concedes a conflict on the standard governing the removal of a potential holdout juror. Opp. 11-12. However, respondent argues that this case does not implicate that circuit split because "Ezell's views were unknown to the litigants

---

[1] Respondent half-heartedly suggests forfeiture because petitioners "did not object to dismissing Ezell, Pavlick, or Masri," but then concedes the point with a staggering qualification: "*other than as to the legal standard employed by the district court.*" Opp. 9 (emphasis added). The question presented plainly relates to the conflicting legal standards governing removal.

and court" at the time she was removed. Opp. 10. That contention is belied by the record. Ezell was removed after the district court and counsel had spent days struggling to respond to a series of notes from the jury in which Ezell complained of verbal abuse, Tr.24053, and another group of jurors sought Ezell's removal because — in their words — Ezell "disagrees with whatever is presented to her" and "only 11 of 12" are deliberating in good faith, Tr.24074-76. These notes revealed the jurors' split, and the lead prosecutor acknowledged that fact at the time in the presence of the court and counsel: "Ms. Ezell, I will say, whether she is for us or against us – *and obviously we saw the notes* . . ." Tr.24581-82 (emphasis added). Further, as Judge Kanne noted, "[t]he district judge left unresolved her consideration of the conflict between potential 'holdout' Juror Ezell and other jurors":

> Nowhere in the record does the district judge make a ruling as to whether a conflict existed between Juror Ezell and other jurors to determine if the jurors had deadlocked or if Juror Ezell was indeed a holdout. Nor did the court determine the impact that dismissing Juror Ezell would have on the other jurors in light of the conflict among the jury as expressed to the court in the jurors' notes, and whether this might give an indication to other jurors that the court was siding with the views of one group of jurors over another.

App. 86a (Kanne, J., dissenting).

The conflict over the removal standard is amply demonstrated. Here, the Seventh Circuit held that "it does not matter what the prosecution may have suspected about Ezell's views on the evidence," App. 31a, so long as *post hoc* there is some "legitimate basis in the record" to support removal, App. 36a. In stark contrast, other circuits have held that so fundamental are the rights to a fair trial and a unanimous verdict from an impartial jury that "if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987); accord *United States* v. *Thomas*, 116 F.3d 606, 622 (2d Cir. 1997) (same); *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) (same). Respondent asserts that the "heightened standard" articulated in these cases is "not triggered" here because there was a legitimate basis for removal. Opp. 13. But that contention itself demonstrates the conflict: there is a world of difference between a system that permits removal of a deliberating juror *only* when there is no reasonable possibility that removal is sought based on the juror's view of the evidence, and the view that "it does not matter" why removal is sought provided there is some basis to justify removal after the fact.

Likewise, the confusion regarding the appropriate standard for substitution cannot be ignored — both before and after the amendment to Rule 24. Opp. 14. The earlier holdings analyzing substitution are rooted in constitutional doctrine. In *United States* v. *Register*, this led the Eleventh Circuit to state that in evaluating the substitution of deliberating jurors "the ultimate question we must decide is whether the re-

cord indicates *a reasonable possibility of prejudice to the defendants*." 182 F.3d 820, 843 (11th Cir. 1999) (emphasis added). Other circuits, by contrast, evaluated the substitution of deliberating jurors for *actual* prejudice. See, *e.g.*, *United States* v. *Josefik*, 753 F.2d 585, 587 (7th Cir. 1985). Here, post-amendment, the Seventh Circuit adopted yet another approach and refused *any* prejudice analysis absent an express rule violation. App. 34a. The government advocated below that substitution should be analyzed under an actual prejudice standard, Gov't Br. 46-50, but now respondent appears to take a different position in this Court, Opp. 14. Indeed, all this demonstrates real confusion on an important question. The *constitutional* concerns implicated by substituting jurors during deliberations — the inherent risk of compromising unanimity and group deliberation — are not altered by the 1999 amendment to Rule 24.

In citing more recent decisions related to removal and substitution, respondent has demonstrated the recurring nature of this issue. Opp. 11. Respondent has not argued that this is an unimportant question, in apparent recognition that it relates to a criminal defendant's most fundamental trial rights — the rights to a fair trial before an impartial and unanimous jury.

B. The Structural Error Question Whether Jurors Fearing Criminal Prosecution Can Be Impartial Is Squarely Presented And Is Important

Respondent does not dispute the importance of the second question presented, that is, whether deliberating jurors who have reason to fear criminal prosecution can be impartial.

1. Respondent suggests instead that petitioners did not preserve this structural error, but that suggestion is baseless. In fact, petitioners raised an objection before the district court, Tr.24692, 24698, and the court acknowledged the objection on the record: "The . . . argument you are making is that we now have a bunch of fearful jurors. I don't know how to address that." Tr.24699. On appeal, petitioners raised the point again. Def. Br. 42. The majority of the Seventh Circuit dismissed it as a "modest point," App. 68a, and yet recognized it as one of "five arguments relating to the process of removal and replacement," App. 24a.

Nor is it of any moment that petitioners themselves asked that some jurors be questioned. The district court is under a continuing obligation to ensure that a trial proceeds in a manner consistent with due process, and when the structural error arose — the jurors' fears of prosecution — petitioners objected and moved for a mistrial. Tr.24699, 24704; R.818.

Indeed, respondent's assertion that a structural error can be waived is itself subject to an ongoing debate. See Pet. 20 n.3; compare *United States* v. *Nelson*, 277 F.3d 164, 205 (2d Cir. 2002) and *United States* v. *Vasquez*, 271 F.3d 93, 100 (3d Cir. 2001), with *United States* v. *Recio*, 371 F.3d 1093, 1100 n.4, 1101, 1103 n.7 (9th Cir. 2004) and *United States* v. *David*, 83 F.3d 638, 647 (4th Cir. 1996).

2. Here, the jurors' fears of prosecution rendered the trial fundamentally flawed and deprived the defendants of their constitutional rights to a fair trial and an impartial jury. See App. 71a, 82a, 90a-91a (Kanne, J., dissenting); *id.* at 98a-99a (Posner J., dissenting). This Court has held that the right to an

unbiased fact-finder is a fundamental trial right that defies harmless error analysis. *Gomez* v. *United States*, 490 U.S. 858, 876 (1989). The government's attempt to immunize the jurors demonstrates, in Judge Posner's words, that "the proceedings were broken beyond repair." App. 99a.

Respondent nevertheless attempts to sidestep the structural error analysis by engaging in a discussion of actual prejudice and speculates that perhaps the jurors did not see the media reports urging their prosecution for perjury, Opp. 18, or did not appreciate the import of the government's offer of immunity, *ibid.*, or did not retain lawyers until after the verdict, *id.* at 18-19 n.2, or otherwise were not intimidated, *id.* at 17-18. But we do not know *any* of that. Federal Rule of Evidence 606(b) precludes the type of inquiry necessary to establish prejudice, namely, asking jurors how their fear of prosecution might have influenced their deliberations. Further, at the government's urging, the district court prohibited defense counsel from speaking with jurors after the verdict. 4/26/06 Tr.15.

Moreover, as Judge Kanne recognized, the district court's inability to enter definitive rulings and create a record on these critical jury decisions only exacerbated the difficulty of discerning prejudice. See App. 87a-88a (Kanne, J., dissenting) (deeming the district court "very conscientious but irresolute" and noting that the "record is at best inconclusive, and at the worst, nonexistent, on the district court's decisions on many of the critical issues in this case"). This Court has held that the inability to quantitatively assess or discern prejudice is a hallmark of structural error. *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 n.4 (2006) (resting "conclusion

of structural error upon the difficulty of assessing the effect of the error").

Finally, this Court's analysis of a fearful juror issue in *Remmer II* is consistent with structural error treatment. *Remmer* v. *United States*, 350 U.S. 377, 382 (1956). Significantly, *Remmer II* ordered a new trial based on an F.B.I. agent's questioning of a juror during trial, and did so even though the district court had found the questioning to be "harmless." *Id.* at 378. The F.B.I. questioning was such that, in the Court's objective opinion, the juror could not, "nor anyone else could say that he was not affected in his freedom of action as a juror." *Id.* at 381. The supposed prejudice discussion on which respondent relies consists of nothing more than an objective consideration of the agent's questioning and actually constitutes an explicit rejection of the analysis respondent offers here: "Proper concern for protecting and preserving the integrity of our jury system dictates against our speculating that the F.B.I. agent's interview with [the juror], whatever the Government may have understood its purpose to be, dispersed the cloud created by [the improper] communication." *Ibid.* That disposition — over the district court finding the error "harmless" and before this Court ever recognized certain errors as "structural" — is consistent with a finding of structural error here.

In short, respondent has cast no doubt on the need for this Court's review of the second question presented.

C. The "Cumulative Error" Question Is Squarely Presented, Is Subject To Conflicts In Authority, And Is Recurring And Important

Nor does respondent seriously dispute the importance of the third question presented, which relates to cumulative error.

1. Instead, respondent claims principally that petitioners "abandoned" their cumulative error argument. But that argument rings hollow. To the contrary, petitioners' appeal briefs are replete with the language of cumulative error from the statement of issues, Br.1-3, summary of argument, Br.17-19 ("an avalanche of errors . . . deprived Warner and Ryan of a fair trial before an impartial jury"), to the individual jury arguments themselves, arguing at length that prejudice had to be assessed in light of the totality of the circumstances, Br.27-29, 41, 42-43, 47-48; Reply Br.1, 5-6, 9-10, 14, 24. The phrase "[a]valanche of errors" is borrowed directly from Judge Posner's opinion in *United States* v. *Santos*, 201 F.3d 953, 965 (7th Cir. 2000) — a case that respondent acknowledges as a cumulative error case.

At bottom, respondent's argument is that petitioners "abandoned" the issue because they did not use the word "cumulative" in describing the myriad of jury and trial errors that combined to deny them a fair trial before an impartial jury. But this Court has recognized that preservation "does not demand the incantation of particular words," but requires only that the court be "fairly put on notice as to the substance of the issue." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000).

2. Respondent attempts to characterize the circuit split on the constitutional necessity of cumulative error review as a question of what is "properly preserved and presented." Opp. 19-20. What respondent ignores is that the majority of circuits hold that cumulative error review is automatic because it is a required, implicit step in determining if a defendant received a fair trial. Pet. 22-23 (collecting cases).

Petitioners here raised eight issues on appeal, including a number of errors relating to pervasive jury misconduct and removal and substitution of deliberating jurors, and then argued that those errors denied them a fair trial. Respondent does not dispute that, in the vast majority of circuits, that would automatically warrant cumulative error review. But in the Sixth and now the Seventh Circuits, the errors raised on appeal will be considered only in isolation. Those decisions are in conflict, and the opposition does not even attempt to deny it.

3. Instead of addressing petitioners' discussion of the conflict, respondent argues that "only one jury error" occurred. Opp. 20. That contention is belied by the Seventh Circuit's opinion, which states that "the district court handled *most problems* that arose in an acceptable manner, and . . . whatever error remained was harmless." App. 3a (emphasis added). Indeed, the majority's refusal to conduct a cumulative error review suggests that there was more than "only one jury error," since in the Seventh Circuit, cumulative error analysis requires *multiple* errors. *United States* v. *Allen*, 269 F.3d 842, 847 (7th Cir. 2001). Further, respondent simply ignores petitioners' discussion of the circuit split on the question of whether the find-

ing of a "single" error precludes cumulative error analysis. Pet. 23-24 n.5.

In short, the circuits are squarely in conflict, both as to the necessity of cumulative error review in general, and as to the necessity for more than a "single error" to trigger such review.

* * * * *

The opposition merely confirms that each question presented would warrant this Court's attention even if this case did not involve the high-profile prosecution of a senior State official. But that fact also heightens the need for review, not only because of concerns about federal-state comity, but also because, given the publicity this case has generated, the errors committed below will likely be remembered, and have a greater influence on future criminal trials, than they otherwise would. For all these reasons, this Court's review is required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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